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United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA PACIFIC FISHERIES, a Corporation, Its Officers,
Agents, Employees, and All Persons Acting by, Through or
Under It or in Privity With It,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

Filed

Dec 23 1916

F. D. Monckton,
Clerk.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit of Charles Brendible.....	156
Affidavit of Charles D. Jones.....	64
Affidavit of D. Noll.....	59
Affidavit of D. Noll.....	62
Affidavit of D. Noll.....	66
Affidavit of D. Noll, May 31, 1916.....	63
Affidavit of D. Noll, June 1, 1916.....	61
Affidavit of D. Noll, June 12, 1916.....	67
Affidavit of Edmund Verney.....	57
Affidavit of Ernest P. Walker.....	69
Affidavit of Ernie Copeland.....	153
Affidavit of Harry F. Geil.....	56
Affidavit of Joe Jenkins.....	152
Affidavit of John J. Reagan.....	72
Affidavit of John J. Reagan.....	77
Affidavit of John J. Reagan.....	155
Affidavit of John J. Reagan.....	158
Affidavit of John J. Reagan, June 14, 1916.....	72
Affidavit of John J. Reagan, June 15, 1916.....	77
Affidavit of John J. Reagan, June 15, 1916.....	156
Affidavit of John J. Reagan, June 15, 1916.....	158
Affidavit of P. E. Harris.....	54
Affidavit of Walter J. Elliott and Earl E. Jones.	52

Index.	Page
Answer	15
Application for Supersedeas.....	202
Assignment of Errors.....	204
Attorneys of Record, Names and Addresses of..	1
Bill of Exceptions.....	50
Blank Form of Affidavit Referred to in Affidavit of John J. Reagan.....	79
Bond on Appeal.....	216
Certificate of Clerk, U. S. District Court, to Transcript of Record.....	221
Certificate of Stenographer to Transcript of Testimony, etc.	182
Citation on Appeal.....	218
Complaint	2
Conclusion of Law.....	194
Defendants' Proposed Conclusions of Law.....	191
Defendants' Proposed Findings of Fact.....	182
EXHIBITS:	
Exhibit "A" to Complaint—Proclamation by President of United States of America	11
Defendants' Exhibit No. 1—Chart of Clar- ence Strait — Revillagigedo Channel and Portland Canal. S. E. Alaska....	178
Defendants' Exhibit No. 2—Map of Fish- trap Location—Cedar Point, Annette Island, Alaska.....	181
Exhibit No. 1 to Affidavit of Ernest P. Walker	176
Exhibit No. 2 to Affidavit of Ernest P. Walker	177

Index.

Page

Final Decree.....	196
Findings of Fact.....	187
Injunction and Final Decree.....	196
Letter, May 13, 1916, Acting Secretary of War to Secretary of the Interior.....	75
Letter, May 17, 1916, Alaska Pacific Fisheries to D. Noll.....	67
Memorandum Opinion.....	36
Names and Addresses of Attorneys of Record..	1
Opinion, Memorandum.....	36
Order Allowing Appeal, etc.	214
Order Settling Bill of Exceptions.....	195
Petition for an Appeal.....	199
Praecipe for Transcript of Record.....	220
Reply	32

TESTIMONY ON BEHALF OF DEFEND-
ANTS:

BURCKHARDT, CHARLES A.	81
Cross-examination	104
Redirect Examination.....	130
Recross-examination	132
BURCKHARDT, F. O.	135
Cross-examination	142
Redirect Examination.....	150
Recross-examination	151
HANFORD, C. H. (In Surrebuttal).....	170
REAGAN, JOHN J.	161
Cross-examination	161

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

263—K. A.

No. 1468—A.

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting by, Through, or Under It or in
Privity with It,

Defendant and Appellant.

Names and Addresses of Attorneys of Record.

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Alaska,

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Francisco, California,

Counsel for Appellee.

*In the District Court for the District of Alaska,
Division Number One, at Ketchikan.*

263—K. A.

No. 1468—A.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting by, Through, or Under It or in
Privity with It,
Defendants.

Complaint.

Comes now the United States of America, and brings this Bill of Complaint against the Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, and complaining against the said defendants alleges:

I.

That the plaintiff, by virtue of its sovereignty, is the owner and seized in fee of the body of land known as Annette Island, situated in the Alexander Archipelago, in Southeastern Alaska, on the north side of Dixon's entrance, all situate within the First Division of the District of Alaska and within the jurisdiction of this court, and of the waters adjacent thereto.

II.

That prior to March 3, 1891, said island was occupied by an association of Indians known as the Matlakatlans or Metlakatlan Indians, and on said date the President approved an Act of the Congress of the United States, setting aside and apart as a reservation for the use of said Indians and such other Alaska natives as might join them said Annette Island and the islands adjacent thereto, which said Act is an Act entitled "An Act to repeal timber culture laws, and for other purposes," approved March 3, 1891, and Section 15 thereof provides as follows:

"Sec. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago, in South-eastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakatla Indians, and those people known as Metlakatlans who recently emigrated [1*] from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

III.

That by virtue of said Act of Congress, the said Annette Islands and the whole thereof, the uplands together with the shore lands, became and at all times

*Page-number appearing at foot of page of original certified Record.

since the date of said Act have been and now are reserved to the exclusive use and benefit and occupancy of the Indians mentioned in said act, with the exclusive right to the use of the shore or tide-lands at all places on said islands to deep water free from obstructions or structures erected or maintained by others, and to the right of fishery in the waters surrounding said islands exclusively.

IV.

That ever since the passage of said Act of Congress, the Indians mentioned in said Act have been in the sole, exclusive, quiet and peaceable possession of said islands and the waters surrounding the same and adjacent thereto; that they have improved said lands, built a town thereon known as the village of Metlakatla, built and maintained a school, built and maintained a water system, built and maintained a fish cannery, sawmill, have governed themselves and by ordinances provided for fire protection and health protection, and have been in exclusive possession of the fisheries in the waters surrounding said islands; and in addition thereto have erected and maintained one of the largest churches in the Territory of Alaska.

V.

That in the year 1914, by ordinance of the Council of said Annette Islands, existing under the regulations of the Secretary of the Interior as provided by said Act of Congress, and with the approval of said Secretary, permits were granted to natives among the class mentioned in said Act of Congress to drive

and maintain fishing-traps in the waters surrounding said Island, and like permits were granted to such natives in the year 1915, and at no time since the passage and [2] approval of said Act of Congress has there been any interference by any person not mentioned in said Act of Congress with the possession and rights as aforesaid of the persons mentioned in said act until as herein alleged.

VI.

That in the year 1916, and prior to the commencement of this action, and, to wit, on April 28th, 1916, the President of the United States issued his proclamation defining the water boundaries of said reservation, and further reserving the fisheries thereof, and warning all unauthorized persons not to fish in or use any of the waters described therein; that the waters mentioned in said proclamation belong to the United States, and are within the jurisdiction of this court, and are part of the reservation by said proclamation and theretofore by said Act of Congress made for the use of the persons mentioned in said Act of Congress. A copy of said proclamation is hereto attached and made a part hereof and is marked Exhibit "A."

VII.

That all of the waters mentioned herein are navigable waters of the United States, and under the provisions of the Act of Congress of March 3, 1899 (approved on March 3, 1899), entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and

harbors and for other purposes," it was made unlawful for any person to create any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States, or to build or commence to build any structure in any waters of the United States except within established harbor lines, unless authorized by the Secretary of War prior to the beginning of the same, and upon plans submitted to and approved by the Chief of Engineers and the said Secretary, and that no harbor lines have ever been established in any of the waters of, surrounding or adjacent to said Annette Islands.

VIII.

That in the year 1916, prior to the commencement of this action the defendant Alaska Pacific Fisheries, a corporation, without right or title or color of same, and unlawfully, and with full knowledge [3] of all and singular the matters and things hereinbefore set out, and with knowledge of the intention of the President of the United States to issue the proclamation set forth herein, trespassed and entered upon the lands herein described, to wit, on the westerly shore and shore-land of said Annette Island, and drove a fish-trap from the shore of said island over the tide-lands and out into the deeper waters adjacent to said island and within the three thousand feet reserved in said proclamation, and in defiance of the law as herein set forth, and of said proclamation, and of notice personally served upon it and posted upon said premises, have maintained and are

maintaining and fishing said trap upon said shorelands and the said reserved adjacent waters, and threaten to continue the same unlawfully and defiantly as aforesaid.

IX.

That on, to wit, May 2, 1916, notice was duly served by posting and personal delivery to said defendant of said reservations and said defendant was notified to cease driving or attempting to drive traps in said reserved lands and waters and to cease fishing therein.

X.

That other corporations, companies and persons have threatened to commit like trespasses upon said reservation, encouraged thereto by the action of the defendant herein, and threaten that they will commence the constructions of similar structures and commit other and further trespasses upon said property.

XI.

That the plaintiff has been for over a quarter of a century engaged by the means herein set forth and otherwise in caring for, educating and civilizing the Indians mentioned in said Act of Congress, and said Indians are now in the main educated and have adopted the habits and customs of civilized peoples, and the effect of the encroachments set forth herein upon the said reservation is greatly demoralizing and tends to destroy the effect of the plaintiffs [4] twenty-five years' endeavor for the uplift and civilization of said Indians and its efforts to make them

self-supporting and self-governing, and will thereby cause the plaintiff and said Indians irreparable injury, and there is no plain, sufficient, speedy or adequate remedy at law in the premises; that under the provisions of said Act of March 3, 1899, plaintiff is entitled to a mandatory injunction commanding said defendants to remove said structure from said water, and plaintiff is also entitled to an injunctional order from this Court requiring said defendants to desist from further construction, operation or maintenance of said structures *pendente lite*.

XII.

That the persons mentioned in said Act of Congress, to wit, said Indians, have at all times since the approval of said Act fished in the waters described in said proclamation, and that during a season lasting about three months and commencing about the middle of the month of May each year large quantities of salmon and other fish travel in the waters aforesaid; that the defendant's said fishing-trap is the most perfect fishing device in class known and catches immense quantities of fish daily during the said fishing season, and each day's operation thereof causes irreparable injury to plaintiff and said Indians, for the reasons herein set forth, and encourages other persons, firms, companies and corporations to commit similar trespasses.

XIII.

That there are ample fishing grounds, and sites and locations for traps in Southeastern Alaska, other than the limited area reserved for the purposes mentioned herein, and defendant has heretofore made

use of them and plaintiff is informed and believes is still so doing; and to permit defendant or others in like situation to maintain or operate traps in the said reserve will tend to destroy the confidence of said natives in the Government of the United States and its promises and endeavors in their behalf, and will result in irreparable injury to them and to plaintiff.

[5]

WHEREFORE, plaintiff prays the Court in the premises,—

For an injunction *pendente lite* directed to said defendants and those acting with, for or under them or in privity with them, at once enjoining and restraining them from continuing the construction of the trap mentioned in this complaint, or from fishing the same, or interfering in any way whatsoever with the free and uninterrupted passage of fish in and through the waters described in said proclamation, or from in any way trespassing upon the lands described in said Act of Congress or the waters adjacent thereto or upon the littoral rights of the said natives.

For a mandatory injunctional order compelling said defendants to vacate said lands and waters and to remove therefrom, and to remove said structures therefrom, and for an order to show cause why said last-mentioned order should not issue, if any they can, returnable at such time as the Court may fix.

That unless within five days from the entry of the order of this Court requiring said defendants to remove said structures and obstructions and vacate said premises, the defendants remove said structures and

obstructions in and upon the lands and waters of the United States, the same may be removed by the order of this Court directed to the marshal of this division, and the necessary costs and expenses of such removal be recovered against the said defendants and judgment therefor be awarded this plaintiff in the final decree of the Court herein.

For costs hereof and for such other and further and additional relief as the needs of the case may demand.

JNO. J. REAGAN,
Asst. U. S. Atty.,
Atty. for Pltff. [6]

United States of America,
District of Alaska, Ketchikan,—ss.

Jno. J. Reagan, being duly sworn, deposes and says: That he is Assistant United States Attorney for the First Division of the District of Alaska, and appears in this action by direction and authority of the Attorney General of the United States; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

JNO. J. REAGAN.

Subscribed and sworn to before me this 31st day of May, 1916.

[Court Seal] C. Z. DENNY,
Deputy Clerk of District Court, District of Alaska,
Division No. 1. [7]

**Exhibit "A" to Complaint—Proclamation by
President of United States of America.**

By the President of the United States of America.

A PROCLAMATION.

Whereas it is provided by section fifteen, of the act of Congress, approved March third, eighteen hundred and ninety-one, entitled, "An Act to Repeal Timber-Culture Laws, and For Other Purposes," that "Until otherwise provided by law, the body of lands known as Annette Islands, situated in the Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's Entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtlan Indians, and those people known as the Metlakahtlans, who have recently emigrated from British Columbia, and such other Alaskan natives as may join them, to be held and used by them in common under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior," and

Whereas the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

Whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery;

Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power

in me vested by the laws of the United States of America, do hereby make known and proclaim that the waters within three thousand feet from the shore at mean low tide of Annette Island, Ham Island, Lowis Island, Spire Island, Homlock Island, and the adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of the said islands, rocks and islets are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them [8] in residence on these islands to be used by them under the fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington this 28 day of April in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and fortieth.

Filed in the District Court, District of Alaska, First Division. Jun. 1, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

[Endorsed]: In the District Court of the United States for the 1st Div. of Alaska. United States of America vs. Alaska Pacific Fisheries, etc., et al. Complaint. [9]

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[Enclosure]

States for the 1st Div. of Alaska. United States of
 America vs. Alaska Pacific Fisheries, etc., et al.
 Complaint. [9]

*In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.*

No. 1468—A.

No. 263—K. A.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES,

Defendant.

Answer.

Comes now the defendants and for Answer to the Complaint of the plaintiff herein admit, deny and allege as follows:

I.

Referring to the allegations contained in paragraph I of the Complaint, the defendants admit the same.

II.

Referring to the allegations contained in paragraph II of the Complaint, the defendants admit the same, only in so far as the same relates to the single island named, Annette Island, denying that any other islands are included in said proclamation.

III.

Referring to the allegations of paragraph III, the defendants admit that subsequent to the passage of the Act of Congress referred to in paragraph II in the Complaint, Annette Island has been occupied by the Metlakatla Indians or Metlakatlans

referred to in the Act; but the defendants deny that the shore-lands or any part of said shore-lands, that is to say, the tide-lands lying between low water and the ordinary line of high tide, have been reserved by virtue of said Act of Congress or have been occupied by said Indians either in whole or in part, [11] and the defendants deny that the right of fishing in the waters surrounding said Island was by virtue of said Act of Congress or otherwise reserved to the use of the said Metlakatlans or others referred to in said Act or at all.

The defendants deny that the said Indians, Metlakatlans or others referred to in said Act or any other person or persons whatsoever have had by reason of said Act or otherwise the exclusive right to use, occupy or control the tide-lands lying between low-water mark and the line of ordinary high tide along the shore of Annette Island or any part of said tide-lands.

IV.

Referring to the allegations of paragraph IV of the Complaint, the defendants deny that ever since the passage of the Act of Congress therein referred to or at all, or at any time whatsoever, the Indians mentioned in said Act or any other person or persons whatsoever have been in the sole or exclusive or quiet or peaceable possession, or have been in any wise possessed of the waters surrounding said Island and adjacent thereto or any part or portion of said waters whatsoever.

The defendants admit that the Indians referred to in said Act have occupied Annette Island and

they have built thereon a village known as Metlakatla containing a school, water system, fish cannery, sawmill, and the defendants further admit that in a limited sense said Indians have governed themselves. This admission, however, is made subject to the following qualification: That while the fish cannery and other improvements mentioned were built by the Indians referred to, all such work of construction was done under the personal supervision of one Father Duncan, a white man, and the operation of [12] the cannery and sawmill mentioned was at all times under the personal supervision of the said Father Duncan, who, as herein elsewhere stated, was at all times at the head of said Indian colony until deposed by the plaintiff, and in this connection it is further averred that neither said cannery nor sawmill have been operated since the time that said Father Duncan was so deposed.

V.

Referring to the allegations of paragraph V of the Complaint, the defendants aver that they have not knowledge or information in relation to the matters and things therein set forth sufficient to enable them to form a belief and they therefore deny the same.

VI.

Referring to paragraph *six* VI of the Complaint, the defendants admit that on the 28th day of April, 1916, the President of the United States issued a proclamation as in said paragraph referred to, but in this connection aver that said proclamation so issued was issued without authority of law and is void

and of no effect. In this connection defendants aver that said proclamation of the President was made without authority and in violation of the provisions of the Constitution of the United States, the matters referred to and sought to be affected by said proclamation being entirely within the jurisdiction of Congress, under the provisions of the Constitution.

VII.

Referring to the allegations of paragraph VII of the Complaint, the defendants deny each and every allegation in said paragraph contained, except that the waters therein referred to are navigable waters of the United States, and that no harbor lines have ever been established in any of the waters surrounding or adjacent to Annette Island. [13]

VIII.

Referring to paragraph VIII of the plaintiff's complaint, the defendants aver that the Alaska Pacific Fisheries constructed a fish-trap in the navigable waters on the westerly side of Annette Island, but deny the said fish-trap was constructed without right or without title or color of title, or that the same was constructed unlawfully, and further deny that said fish-trap was constructed with full knowledge or with any knowledge whatsoever of the fact that the President of the United States intended to issue the proclamation referred to in the complaint and hereinbefore referred to, or with any knowledge of any of the matters or things referred to as set out in the complaint, except such

matters and things as have been hereinbefore expressly admitted.

And the defendants further deny that they trespassed upon the westerly shore or any part of Annette Island or committed any act of trespass whatsoever, and deny that they entered upon the shore-land of said Island or upon said Island at all either for the purpose of driving a fish-trap or otherwise; deny that they entered upon the tidelands lying in front of said Island in this connection or at all, but admit that the fish-trap constructed by them is situate within three thousand feet from the shore of said Island, denying, however, that the same is within any reserve created or existing, admitting that the same is within the area sought to be reserved by the proclamation of the President hereinbefore and in the Complaint referred to, averring that said proclamation was issued without authority of law and is void and of no effect.

Defendants further deny that said fish-trap was constructed in defiance of law or in defiance of said proclamation [14] made by the President, and aver in this connection that the construction of said fish-trap commenced on the 7th day of April, 1916, and was completed on the 18th day of April, 1916; that no knowledge, notice or information ever reached the said Alaska Pacific Fisheries, or any of these defendants, that the President of the United States intended to issue any such proclamation as is herein referred to and as is referred to in the Complaint until after said fish-trap was fully completed, and that the notice served as referred to in

paragraph VIII was served upon the defendants and the said Alaska Pacific Fisheries after the completion of said fish-trap.

The defendants in this connection further aver that while it is their intention to operate said fish-trap for the purpose of catching fish to supply their canneries as hereinafter more specifically set forth, said acts of said defendants in so operating the same are neither unlawful nor defiant, but are within the rights of said defendants and the said Alaska Pacific Fisheries as citizens of the United States as hereinafter more expressly referred to.

IX.

Referring to the allegations of paragraph IX, the defendants admit that they were on the 4th day of May, 1916, served with a notice as in said paragraph set forth.

X.

Referring to the allegations of paragraph X of the Complaint, the defendants aver that they have not knowledge or information concerning the matters and things therein set forth [15] or any of them sufficient to form a belief, and therefore the defendants deny each and every allegation contained in said paragraph X and the whole thereof.

XI.

Referring to the allegations in paragraph XI of the Complaint, the defendants deny that the plaintiff has been for a period of a quarter of a century, or at all, engaged by the means set forth in the complaint or otherwise or at all in caring for, educating or civilizing the Indians mentioned in the Act of

Congress, or that the plaintiff has in any wise assisted said Indians or rendered them any service whatsoever, except that Annette Island was by Act of Congress reserved for their use as hereinbefore set forth.

The defendants admit that the Indians have been to some extent during the past twenty-five years educated, and they have to some extent adopted the habits and customs of civilized people, but deny that this is due either in whole or in part to any efforts on the part of the plaintiff.

The defendants deny that the Indians mentioned have been injuriously affected by any of the matters and things referred to in the Complaint or that any encroachments upon their rights on the part of the Alaska Pacific Fisheries or any of the defendants herein has been demoralizing or has tended to destroy the effect of the plaintiff's endeavors during twenty-five years or at all for the uplifting and civilization of said Indians, or the endeavors of anyone else other than the plaintiff in behalf of these matters either in the way of making said Indians self-supporting, self-governing or otherwise, or that any of the matters or things referred to in the Complaint will cause the plaintiff or said Indians irreparable injury or any injury whatsoever, and defendants further deny that there is no plain, speedy remedy at law, and denying that the plaintiff is entitled under the provisions of the Act of March 3, 1899, or under the provisions of any other act [16] or law whatsoever to a mandatory in-

junction commanding the defendants to remove structures from the waters referred to or to any other relief whatsoever, or that the plaintiff is entitled to an injunction to be issued out of this court requiring the defendants to desist from further constructing, operating or maintaining the structures referred to during the pendency of this action or to any other relief in this connection whatsoever. And in connection with the matters and things referred to in said paragraph XI, the defendants aver:

That prior to the time the Act of Congress referred to in the Complaint and hereinbefore referred to, setting aside Annette Island as a reservation was passed, one Father Duncan, a man of benevolent and altruistic tendencies, had proceeded to British Columbia with a view of civilizing and uplifting the native tribes resident in that locality; that he, at the head of a colony, migrated from said British Columbia to Annette Island, taking with him from said British Columbia the Metlakatla Indians or Metlakatlans referred to in the Act of Congress creating said reservation; that all of the Indians so migrated from British Columbia to Annette Island were citizens, residents and inhabitants of British Columbia prior to the said migration and came to Annette Island as members of a colony headed by the said Father Duncan.

That prior to the passage of the act creating the [17] reservation referred to, a party composed of United States Senators and other influential men visited said colony and at the request of said Father Duncan introduced in Congress the measure creat-

ing the Annette Island Reservation for the use and benefit of said colony of Indians; that said Father Duncan, without any assistance from the plaintiff whatsoever, established a church, a school, a cannery, a sawmill and the other improvements referred to in the Complaint on said reservation, employing in that connection the Indians residing upon the reservation; that through the efforts of said Father Duncan and through his efforts alone said Indians were educated and civilized and taught the habits, trades and customs of civilized people.

That while the said Father Duncan was so active in the uplifting and civilization of said Indians, the plaintiff, acting through one of its bureaus, deposed said Father Duncan as leader of said colony and placed the same, together with all the structures and improvements placed thereon at the direction of Father Duncan, under the control of the Bureau of Education; that said action of the Bureau of Education was resisted by said Father Duncan, but notwithstanding such resistance, said Bureau of Education assumed control of all the property situate on Annette Island and deposed said Father Duncan from the leadership of said colony, which action on the part of the Bureau of Education resulted in the demoralization of the colony and the undoing of much of the benevolent work theretofore performed by the said Father Duncan.

That the said Father Duncan was so deposed and the [18] property referred to was so seized by the said Department of Education in the year —, and that since said last-mentioned date the cannery

and sawmill situate on said Island, which had been theretofore profitably operated by said Father Duncan have remained idle, and the good work, both in connection with the civilization of the Indian tribes and in the attempt to make such tribe self-supporting, was by said indiscreet action of the Bureau of Education largely undone.

XII.

The defendants admit that the Indians mentioned in the Act of Congress have since the approval of said Act to some extent fished in the waters described in the proclamation of the President hereinbefore referred to, and the defendants admit that during each fishing season large quantities of salmon and other fish travel in said waters.

The defendants further admit that the defendants' fishing-trap constructed as hereinafter more specifically set forth is the most perfect fishing device known, and is such as to catch large quantities of fish daily during the fishing season, but denies that each day's operation thereof, or the operation thereof for any period of time whatsoever, will cause irreparable injury or any injury whatsoever to the plaintiff or to the said Indians or to anyone else, and deny that any of the matters and things set forth in the Complaint will encourage any person, persons, corporations, companies or firms or anyone whatsoever to commit any kind of trespass.

XIII.

Referring to the allegations of paragraph XIII, the [19] defendants deny that there are ample

fishing grounds or sites or locations for traps in Southeastern Alaska outside of the area embraced within the reserve of the President herein and in the Complaint referred to.

The defendants admit that they have heretofore caught fish in other localities and that they are still catching fish in other localities as hereinafter more specifically narrated, but deny that they are able to catch a sufficient supply of fish in localities other than the waters embraced within said so-called reserve of the President to supply their now existing canneries with fish for canning purposes.

The defendants deny that to permit the defendants or others in like situations to maintain or operate traps in the waters contained within said so-called reserve would tend to destroy the confidence of the natives in the government of the United States or to destroy the confidence of such natives in the promises and endeavors of such Government in their behalf, or that to do so would result in irreparable injury or any injury whatsoever to them or to the plaintiff.

And the defendants further answering aver:

I.

That the Alaska Pacific Fisheries is a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, duly authorized to do business in the Territory of Alaska, under and by virtue of the laws thereof, having complied with all the requirements of the laws of said Territory relating to corporations, and that it is authorized [20] to engage in the business of fishing and can-

ning fish and to carry on and conduct other similar pursuits.

II.

That each and all of the stockholders of said Alaska Pacific Fisheries are citizens of the United States of America and that there have been no alien stockholders in said corporation at any time since its organization.

III.

That said corporation is the owner of three salmon canneries situate in Southeastern Alaska, one of these is situate at Chilkoot Inlet, many miles to the north of Annette Island, and this cannery is not dependent for its fish supply upon fish caught in any of the waters or localities hereinbefore referred to, the other two canneries are situate, one at Yes Bay and one at Chomly. The first named cannery of these last-mentioned canneries, that is to say, the cannery situate at Yes Bay is dependent to a considerable extent upon fish caught within the navigable waters of the United States situate within the area covered by the President's proclamation aforesaid, and the last mentioned, that is to say, the cannery situate at Chomly is dependent from $\frac{1}{2}$ to $\frac{1}{3}$ for its fish supply upon fish caught within the navigable waters of the United States embraced within said proclamation of the President.

IV.

That in the construction of said canneries the said Alaska Pacific Fisheries Company has expended many thousands of dollars, said canneries being in all respects modern and well equipped canneries;

the cannery at Yes Bay having a capacity of 100,000 cases and that at Chomly having a capacity of 110,000 cases; that in the winter and spring of [21] 1915 and 1916 the said Alaska Pacific Fisheries bought its supplies for and equipped its said canneries so that the same could be fully operated during the year 1916, and expended in that behalf a sum aggregating \$500,000.

That for many years last past the said Alaska Pacific Fisheries has caught and purchased fish caught in the navigable waters of the United States so enclosed within the proclamation of the President for use in its said canneries, and relying upon its right to catch and take from such navigable waters the fish found therein has expended the sums aforesaid in the construction and equipment of its said canneries.

That in the spring of 1916, with a view of supplying its said canneries, more especially its said Chomly cannery, the capacity of which had been increased during the winter of 1915 and 1916, constructed a fish-trap in the navigable waters of the United States off the west shore of Annette Island, which said fish-trap was so constructed that the portion thereof nearest the shore was and is more than 600 feet distant from Annette Island, and a considerable distance below and to the seaward of low-water mark, and its seaward portion is distant approximately 2000 feet from the shore of said Annette Island; that said fish-trap so constructed is a well-known ordinary and usual device employed in

catching salmon in the navigable waters of the United States, and is so constructed that it does not interfere with navigation or in any wise obstructs the navigable channels or waters of the United States or prevents the free use thereof, but that to the contrary said trap so constructed and maintained is an actual aid to navigation and serves to take the place of aids to navigation which should be maintained by the plaintiff. [22]

V.

That said fish-trap was fully completed before any proclamation was issued by the President as stated in the Complaint or at all, and was built and completed without any knowledge of any intention on the part of the President to issue such proclamation, and that in its construction and maintenance said Alaska Pacific Fisheries acted lawfully and in the exercise of its right to catch food fish in the public fisheries, and further that said trap was constructed in full compliance with the laws of the United States and the Act of Congress relating to the construction and maintenance of fish-traps, is not situate across or above the tide-waters of any creeks, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red salmon stream or within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fish appliance.

And in this connection the defendants further aver that if the Alaska Pacific Fisheries is deprived of the use of said trap, it will be unable to supply its said canneries, more especially its said Chomly

Cannery, with sufficient fish to operate the same except to a very limited extent during the year 1916; that if so deprived to operate its said cannery to its full extent at Chomly a large extent of the moneys so expended in outfitting the cannery for the season's work of 1916 will be lost; that the loss in that behalf to the Alaska Pacific Fisheries if not allowed to operate said fish-trap during the year 1916 will aggregate at least fifty thousand (\$50,000.00) dollars, all of which will be a total loss to the said Alaska Pacific Fisheries.

In this connection the defendants further aver that [23] the salmon cannery formerly constructed on Annette Island as hereinbefore set forth was destroyed by fire, and that there is not now any cannery on Annette Island in which salmon can be canned, and that because of the lateness of the season it is impossible to construct a cannery on said Island in time to can fish caught during the season of 1916.

That the Indians residing on Annette Island have always been employed by the said Alaska Pacific Fisheries in connection with its operations to the extent that all of such Indians seeking such employ have at all times been given employment; and that the said Alaska Pacific Fisheries have already during this season and still intend to employ such Indians in that connection.

That the issuance of an injunction *pendente lite* would not only work irreparable injury to the defendant, the Alaska Pacific Fisheries, in that it would cause a loss to it during the season of 1916 of

not less than fifty thousand (\$50,000) dollars because of its failure to put up its salmon pack during that season if prevented from so supplying its cannery with fish, to say nothing of the loss to the plant and the original investment therein if such plant is deprived of its fish supply by the threatened action of the plaintiff, but, on the other hand, the Metlakatls and Metkatla Indians will, if this injunction be issued, be deprived of employment because of their inability to catch fish in said trap and assist in the canning of the same, and suffer great injury in that behalf in view of the fact that no cannery exists on Annette Island in which such Indians can be employed or in connection with which such employment [24] can be obtained.

That in making the investments above referred to and making the expenditures of money herein related, the Alaska Pacific Fisheries relied not only upon its right to catch fish in the waters of the United States, but also upon the Acts of Congress regulating the fisheries and enacted in relation to such fisheries, and upon the good faith of the Government of the United States in the preservation and protection of its said rights.

WHEREFORE the defendants pray that the plaintiff's bill be dismissed and that the application for an injunction *pendente lite* be denied, and that the restraining order heretofore issued be dissolved.

JAMES A. SHOUP,

C. H. HANFORD,

HELLENTHAL & HELLENTHAL,

Attorneys for the Defendants.

United States of America,
Territory of Alaska,—ss.

Charles A. Burckhardt, being first duly sworn, on oath deposes and says: That he is the president of the Alaska Pacific Fisheries, defendant herein; that he has read the foregoing Answer, knows the contents thereof, and believes the same to be true, and affiant makes this affidavit on behalf of the Alaska Pacific Fisheries.

CHARLES A. BURCKHARDT.

Subscribed and sworn to before me this 15th day of June, 1916.

[Seal]

SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Nov. 30, 1917.

Due service by copy admitted this 15th day of June, 1916.

JNO. J. REAGAN.

Filed in the District Court, District of Alaska,
First Division. June 15, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [25]

*In the District Court for the District of Alaska,
Division No. One, at Ketchikan.*

No. 1468-A.

No. 263-K. A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Reply.

The plaintiff, referring to the 8th paragraph of defendant's answer, denies that said trap was completed on the 18th day of April, 1916, and alleges that said trap was not completed until the latter end of May or the first of June, 1916; and denies all the affirmative matters set forth in paragraph 11 of said answer, excepting as follows: That said Indians migrated from British Columbia to Annette Islands and the plaintiff set aside said Islands as a reserve for said Metlakahtlans and permitted the said William Duncan, described in said answer as Father Duncan, to remain with them and aid in their education and training; and alleges that the plaintiff appropriated large sums of money, to wit over \$15,000, to assist in the education and training, industrially and otherwise, of said Indians, and that said Duncan was entrusted with other sums of money by other persons for the same purpose and in

trust for the use of said Indians; and denies that any action of the plaintiff or any of its departments is responsible for the condition of affairs which plaintiff is struggling to overcome. As to defendant's further answer, plaintiff has no knowledge or information as to allegations thereof and therefore denies the same.

As to the allegations of 4th paragraph thereof, plaintiff has no knowledge or information, and therefore denies the same, except that it admits that defendant purchased fish from the natives caught within the reserve in this action set forth.

As to the allegation of the 5th paragraph thereof, plaintiff [26] denies said trap was fully completed before any proclamation was issued by the President as in this action stated, and denies that same was built and completed without any knowledge of the intention on the part of the President of the United States to issue such proclamation, and denies that it acted lawfully in the construction of said trap, and denies that said defendant will be unable to supply its canneries or any of them with sufficient fish to operate the same if prevented from fishing in the waters reserved by the said proclamation; and alleges that it can supply itself with fish as it has done heretofore by purchasing the same, so far as they are derived from the waters described herein, from the natives inhabiting said reserve; and denies that said defendant will be damaged in the sum of \$50,000 or in any sum at all if prevented from fishing within said reserve; and further denies that

it is impossible to construct a cannery on said reserve in time to can fish during the season of 1916; and denies that that is a material fact in this suit; and denies that the issuance of an injunction will work an irreparable or any injury to the defendant or will cause it a loss of \$50,000 or any sum whatever; and alleges that if there is any loss to the defendant for the driving and maintenance of said trap, it is due to the illegal act of the defendant itself and to no other cause; and denies the right of the defendant to allege any loss to the said Metlakhtlans; and alleges that said allegation is immaterial to any issue in this suit; and alleges that the same is not true. And further, plaintiff denies that said defendant relied upon any pretended right to catch fish in said reserve; and denies that said defendant acted in good faith in the driving and maintenance of said trap and its attempt to operate the same, and alleges that it has been the practice under the regulations of the Interior Department of the United States well known to the defendant to obtain permits from the Interior Department or the Annette Council acting under authority of said Interior Department for the construction of traps in the waters aforesaid, and that these traps are permitted and have been so permitted to be constructed only by inhabitants of [27] said reserve and under financial arrangement well known to the defendant, and the catch of said traps and of all fishing in said waters have been purchased by the defendant and others for the supply of their canneries, and the con-

struction of the trap mentioned herein is a detriment because of preventing the work of the natives in the fishing industry rather than a help to them.

WHEREFORE plaintiff prays as in said complaint it has heretofore prayed.

JNO. J. REAGAN,

Asst. U. S. Atty.

United States of America,

District of Alaska,

At Juneau,—ss.

Jno. J. Reagan, being duly sworn, deposes and says: That he is Assistant United States Attorney for the First Division of the District of Alaska, and appears in this action by the direction and authority of the Attorney General of the United States; that he has read the foregoing reply, knows the contents thereof and believes the same to be true.

JNO. J. REAGAN,

Subscribed and sworn to before me this 15th day of June, 1916.

[Notarial Seal]

INA S. LIEBHARDT,

Notary Public.

My commission expires September 29, 1919.

Received a copy of above June 15, 1916.

HELLENTHAL & HELLENTHAL,

Filed in the District Court, District of Alaska,
First Division. Jun. 15, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [28]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1468-A.

No. 263-K, A.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
its Officers, Agents, Employees, and all Per-
sons Acting by, Through or Under It or in
Privity with It,

Defendants.

Memorandum Opinion.

PRESIDENT'S PROCLAMATION.

Reserving Annette Island for Metlakahtla Indians,
etc. [29]

On March 3, 1891, Congress passed an Act entitled "An Act to Repeal the Timber Culture Laws," the 15th Section of which Act reserves "that body of lands known as Annette Islands" for the use of Metlakahtla Indians and others therein named.

In April of 1916 the defendants, without permission of any kind, began, and at the date of the proclamation hereinafter mentioned had almost completed, a fish-trap situate in navigable waters within 2,000 feet of the shore of Annette Island. Defendants design to complete said trap and to have it ready for effective operation by the time of the commencement of the run of fish, to wit, about July

1st. On the 28th day of April, 1916, the President issued a proclamation reserving

“the waters within three thousand feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island, and the adjacent rocks and islets * * * also the bays of the said islands, rocks and islets are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join them in residence on these islands.”

The Government by this suit seeks an injunction to prevent the defendants from operating said trap and to compel the removal of said trap, basing its suit on the claim that the continuance of the trap at the *locus quo* is in defiance and violation of the terms of the Act and the proclamation, and is also in violation of section 10 of the Rivers and Harbors Act approved March 3, 1899.

Defendants contend that the Act itself does not reserve any water and that the proclamation is unauthorized so far as it attempts to reserve any part of the waters and so is null and void, and that the trap is not an obstruction to navigation and so does not come under the inhibition of the Rivers and Harbors Act aforesaid. [30]

Considering the Act and proclamation, the following is to be considered:

The Attorney General, having been asked for an opinion as to whether or not the President could lawfully set apart a body of public domain for the

use of alien-born Indians, on February 28, 1887, gave it as his opinion that the power of the President "to declare *permanent* reservations for Indians to the exclusion of others on the public domain does not extend to Indians not born or resident in the U. S.," and that it would require an Act of Congress to make the reservation aforesaid:

Notwithstanding that no Act in the premises was in force (but probably in contemplation of the passage of such an act), a tribe or body of Indians known as Metlakahtlans did emigrate from British Columbia and settle upon Annette Islands. There they built and occupied houses, constructed and furnished in the way of the white man, erected churches and schools, planted small gardens, established a rude form of local self-government, and generally attained a state of civilization far superior to that of most natives and of some white men. The principles of humanity naturally dictated that these people should be encouraged in the exercise and development of the intelligence, thrift and industry of which they had given abundant evidence; and too, manifestly it was highly desirable that native Alaska Indians should, if possible, be induced to join them. So on March 3, 1891, Congress inserted the following provision in the Act approved March 3, 1891, entitled "An Act to repeal the Timber Culture Laws" (26 Stats. L. 1101), to wit:

"Sec. 15. That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in South-

eastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

In passing this Act, Congress must be held to have known (what everyone else knew) that the Indians of Alaska are fisher [31] folk and hunters and trappers and largely, if not entirely, depend for their livelihood upon the yield of such vocations—it must be held to have known that without the food yield of the sea these Indians could not survive, for the Annette Islands would not of themselves "as land" afford a subsistence for a community of souls—there being little or no agricultural land on the Islands, or for that matter in all Southeastern Alaska. Not only is the Act an encouragement to remain extended to those Metlakahtlans "who had recently emigrated," but it is also an invitation to come held out to all Metlakahtlans and to such Alaska natives as may join them. The Act affords no promise that the privilege conferred is to be exercised in whatsoever manner the Indians may choose—on the contrary, the use granted is to be held and exercised "under such rules and regula-

tions as may be prescribed from *time to time* by the Secretary of the Interior." In other words, the "Great White Father" says to the Metlakahtlans and to "all other Alaskan natives who may join them," "You are welcome to come to these islands, to make your homes here, to make a livelihood here, to pursue such occupations as you may see fit. My Secretary will make some regulations and restrictions for your welfare, your happiness and your protection. You may use these islands subject only to such rules and regulations, and under such restrictions as he may make."

Good faith undoubtedly requires that the rules and regulations or restrictions spoken of are not to be taken as rules and regulations or restrictions binding only the Indians, but as rules, regulations and restrictions binding upon all other persons. This is necessary in order that the thing to be done may be effected according to the true intent, meaning and purpose of the donors, and in justice to the donee. The object to be accomplished is that these Indians may work out their destiny—that they may develop into good citizens, useful and happy,—not alone for their own sake but for the good of the country and in the interest of humanity and civilization. A reservation is [32] created for them—not the ordinary Indian reservation, within whose limits they are to be *confined*, but a reservation which shall be their home if they choose to make it their home—where the race may multiply and increase, and develop under the guiding hand of a high officer of the Government.

It has been suggested that when the Government grants the upland, the high-water mark is the boundary of the grant, and that in strictness these Indians are entitled to the exclusive use of only so much as is above high-water mark; but the privilege conferred bears no analogy to a grant of land—nothing is granted to these Indians except a privilege, and that, too, only “until otherwise provided by law.” No title is parted with by the Government. To hold that the privilege extended means nothing more than that the Indians are to have the use of the upland only is to say that Congress is engaged in the business of luring the unsuspecting, of cheating and deceiving them. The language is not to be construed in the strict, narrow, legal sense which obtains between equals dealing at arm’s-length, but in a broad and generous sense in which words are to be taken when one of superior power, knowledge and intelligence deals with an inferior—the language used must not be so interpreted “as to justify the charge that the Government has laid a trap” for these people.

To construe the invitation extended by the act with all the strictness of a legal conveyance of real estate would defeat the very object contemplated by the act.

Good faith also suggests that when Congress set apart “that body of lands known as the Annette Islands,” it ought not to be held to mean only land—it must be held to mean “the lands” generally and the adjacent sea to a reasonable extent, in which alone were to be found that which made liv-

ing upon the land a possibility—a practicability. The very generality of the terms used, to wit, “the body of lands,” “Annette Islands,” would seem to indicate that Congress did not mean to dole out its generosity in inches, feet, or even acres, but that it meant to confer a useful, practicable, [33] benefit to the Indians by securing to them a useful and practicable home.

The “body of lands known as Annette Islands” should be taken to mean “that region” known as Annette Islands,—as if one should say that body of lands known as Alaska, or that body of lands known as the Philippine Islands or Porto Rico.

Congress meant to make an Indian reservation. Alaska, it is true, is not Indian country in the conventional sense of the word, and the aborigines of Alaska have never been compulsorily herded upon reservations, yet it is Indian country so far as Congress chooses to make it such (U. S. vs. Nelson, 29 Fed. 202), and “that body of lands known as Annette Islands” is an Indian reservation because Congress has chosen to make it such. From that day to the encroachment by the defendant complained of by the complaint the Indians and the public generally have treated the Act as one reserving the waters immediately contiguous to the high land of these islands as well as the high land itself.

It is in evidence from the date of the Act until the irruption of these defendants in 1916, a period of twenty-five years, no attempt has been made to encroach upon the use by the Indians of the islands or the waters adjacent thereto. (Verney’s affi-

davit.) On the land they have built their houses, while the waters surrounding the islands have furnished them with a bountiful supply of fish. At first the only use for the fish caught was for immediate consumption or for smoking for use later by the tribe and those with whom they bartered, but with the development of the fish-canning industry in Alaska, a wider and more lucrative market for fish *spring* into existence. The Indians, under the directions of him who had brought them out of barbarism, established and for some time operated a salmon cannery. This not only supplied them with a very edible variety of food, but also furnished employment to many of the tribe, and other Indians.

Congress had the right to do as it pleased with these lands and waters. The people of the United States, succeeding to and [34] exercising the prerogative of the British Crown and the powers of Parliament, certainly have plenary power, through their representatives, over the lands and waters of the United States—to make reservations of land for public purposes—to grant exclusive rights of fishery, and even to close navigable waters.

(2 Farnham on Waters, sec. 370, p. 1373.)

The Congress, representing the people of the United States, has under the Constitution the power to dispose of and make all needful rules and regulations respecting the Territory of other property belonging to the United States.

(Constitution, Article IV, Section 3.)

Annette Island, and all islands, lands and waters in Alaska, were, on March 3, 1891, the property of

the United States. Congress made this Reservation for these Indians and has confirmed it in later legislation (6th proviso of Act of May 14, 1898, 30 Stats. L. 409; Compiled Laws of Alaska 1913, sec. 92), and has strikingly manifested its approval of the Metlakahtlans by the Act of March 4, 1907 (34 Stats. L. 1411; Alaska Compiled Laws 1913, sec. 24), allowing them to own motor boats and take out licenses as engineers and pilots and masters.

Some time in April of 1916 defendants went upon the waters within about 2,000 feet of the low-water mark of Annette Island and began the construction of a fish-trap, such as is commonly used by the canneries of Alaska whereby to secure a supply of salmon for canning. Such fish-traps are very effective for the purposes for which they are intended, and unless such contrivances are thoroughly regulated and supervised they will eventually completely exhaust the supply of fish. It appears from the evidence that the islands are very advantageously situated in this regard—they are comparatively near the open sea, and large quantities of salmon coming therefrom and making their way to their spawning grounds, pass within the three thousand foot limit fixed by the President's proclamation herein mentioned. It also appears that fish-trap sites are not only becoming [35] very scarce farther inshore, but also the nearer the open sea the fish are caught the better they are for canning purposes. (Burckhardt's testimony.)

The run of fish at Annette Island does not com-

mence until about July 1st of each year, and before the webbing or netting was put upon the trap in question the President issued the said proclamation. That proclamation in terms is more specific than the terms of the Act. The Act does not say anything in specific terms about "3,000 feet" of the shore of Annette Island, but the proclamation does.

The power of the President to withdraw land or water which the United States owns and over which it has exclusive jurisdiction and devote it to use for the public good can hardly be successfully denied. Such power has been exercised from the earliest times in the creation of Indian reserves and military and naval reserves and as sites for fortifications, etc. Indian reservations are reservations for the public purposes. (17 Opinions Atty. Gen. 260.)

"An Indian reservation is part of the public domain set apart by the proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an act of Congress, by a treaty, or by an executive order."

Wolcott vs. Des Moines, 5 Wall. 681.

Grisar vs. McDowell, 6 Wall. 663.

U. S. vs. Payne, 8 Fed. 888.

43 cases Brandy, 14 Fed. 539.

It is not unreasonable to construe the Act itself as a reservation not alone of the land but also of a reasonable extent of waters immediately adjacent thereto, which may be necessary to effect the objects and purposes of the Act interpreted in the light of circumstances and conditions. For the Ex-

ecutive so to construe it and to make rules and regulations and restrictions in accordance with such construction is not to usurp legislative functions—it is but to execute the law in its true scope and meaning.

By the Constitution (article 2, section 3) it is made his duty to “take care that the laws be faithfully executed”; Mr. Justice Miller has asked, “Is this duty limited to the enforcement [36] of the Acts of Congress according to their express terms, or does it include * * * all the protection implied by the nature of the government under the constitution?”

(In re Neagle, 135 U. S. 64—16.)

Presidential reservation of a portion of the sea, under an Act reserving in terms only “lands,” finds precedent in the action of President Harrison, who by his proclamation of December 24, 1892, set apart “Afognak Island, Alaska, as a public reservation, including use for fish culture station, *and its adjacent bays and rocks and territorial waters*, including among others the Sea-lion Rocks and Sea Otter Island,” and said proclamation contained an express warning to all persons “not to enter upon or occupy the tract or tracts of land *or waters* reserved by this proclamation, *or to fish in or use any of the waters herein described or mentioned*, and that all persons or corporations now occupying said island, or any of said premises, except under said treaty shall depart therefrom.” (27 Stats. L. 1052; Compiled Laws of Alaska, 1913, page 174.)

It will be seen that this is a very extensive reservation of waters and a very drastic curtailment of the rights of both fishery and navigation, and yet the only Act of Congress on the subject which I have been able to find is contained in the 14th section of said Act of March 3, 1891, as follows:

“That none of the provisions of the last two preceding sections shall be so construed as to warrant the sale of any ‘lands’ (note the word ‘land’—R. W. J.) * * * which shall be selected by the United States Commissioner of Fish and Fisheries *on the island* (note the words ‘on the island’) of Kodiak *and Afognak* for the purpose of establishing fish culture stations.”

This reservation has never been directly attacked, but in the case of *Russian American Co. vs. U. S.*, 199 U. S., page 579, the Supreme Court say:

“As the President exercised the rights thus reserved, and declared the whole island appropriated for the purpose of establishing a fish-culture station, and warned all persons to depart therefrom, it is clear that the rights, if any, previously acquired by the settlement were terminated by the proclamation.”

So far as I have been able to ascertain, the action of President Harrison in making the [37] reservation include the water for a distance of 1,000 feet of the shore has never been characterized as “an attempt to govern America by proclamation.”

I am forced to the opinion that the area marked

on the plat accompanying the proclamation of the President in evidence in the case at bar is lawfully reserved—that it is a reasonable reservation—a necessary one—for public purposes—“of territory or other property belonging to the United States,” and that defendants are trespassers.

But it is said that even granting that the intent, meaning and scope of the reservation in the Act is broad enough to include the area within 3,000 feet of the low-water mark, or granting the validity of the President's proclamation, still the United States has no equity for an injunction because it has no pecuniary interest.

This suit is brought by the Government in its capacity as Sovereign as well as in its capacity as Lord Paramount of the Land and the Water. The sacred faith of the nation is pledged to these Indians—the latter are invitees of the Government—The obligation on the part of the Government to live up to its obligations is enough to give it standing in equity—even if there were no other considerations.

In *U. S. vs. World's Exposition*, 56 Fed. 630, where the standing of the Government in a suit for injunction was challenged on the ground of lack of pecuniary interest, the Court, after deciding that the Government did in fact have a pecuniary interest, observes (p. 638, bottom):

“and besides it is under the highest obligations of honor and law to protect the property and interest of foreign nations and of the sev-

eral States of the Union, and of all exhibitions brought here by its invitation. * * * Having such * * * and having no other means of enforcing obedience to its regulations, the Government is entitled to the assistance of the Court. * * * There are other rights and equities quite as sacred as dollars and equity protects against injuries which cannot be measured in money. * * * ”

and on page 640: [38]

“The right of the Government to maintain a Bill in Equity on the ground of obligation or duty either to an individual or to the public when it had no pecuniary interest is affirmed in several instances by the Supreme Court.”

U. S. vs. S. J. Tin Co., 125 U. S. 273.

U. S. vs. Beebe, 127 U. S. 338.

U. S. vs. Marshall, 129 U. S. 579.

Cartner vs. U. S., 149 U. S. 662.

The foregoing considerations dispose of the case at bar and call for the issuance of an injunction as prayed for by the Government.

Plaintiff also bases the right to an injunction on the allegations in the complaint, and the proof offered in support thereof, that the defendants' structures are a hindrance to navigation and are in violation of the provisions of the Rivers and Harbors Act of 1899; so far as this contention is concerned, I am constrained to hold with the defendants—I do not think that the structures are a hindrance to navigation.

Findings and decree may be prepared in accordance herewith.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska,
First Division. Jun. 30, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [39]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 263-K. A.

No. 1468-A.

UNITED STATES OF AMERICA

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.

Bill of Exceptions.

Filed in the District Court, District of Alaska,
First Division. Jul. 10, 1916. J. W. Bell, Clerk.
By —————, Deputy. [40]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 263-K. A.

No. 1468-A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting by, Through or Under It or in
Privity With It,

Defendants.

BE IT REMEMBERED, that this cause came on regularly for trial on the 15th day of June, 1916, before the Honorable Robert W. Jennings, Judge of the above-entitled court, upon an order to show cause why the defendants should not be enjoined, during the pendency of the action, from maintaining a fish-trap in the navigable waters of the United States to the westward of Annette Island, within 3,000 feet of the shore of Annette Island; the plaintiff being represented by John J. Reagan, Assistant United States Attorney, and the defendants being represented by Hellenthal and Hellenthal, C. H. Hanford and J. M. Shoup, and all parties being regularly before the Court, the following proceedings were had:

The plaintiff, to maintain the issues on its part, read in evidence the affidavit of Walter J. Elliott

and Earl E. Jones, which was in words and figures as follows, to wit: [41]

*In the District Court for the District of Alaska,
First Division, at Ketchikan.*

No. 263-K. A.

No. 1468-A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of Walter J. Elliott and Earl E. Jones.

United States of America,

District of Alaska, Ketchikan,—ss.

Walter J. Elliott and Earl E. Jones, being severally duly sworn, each for himself and not one for the other, on oath depose and say: That Walter J. Elliott, the above-named deponent, is the Captain of the gas tug-boat "Leonine," and that E. E. Jones, the above-named deponent, is the engineer of said tug-boat; that on Sunday, May 21st, 1916, at 3:50 P. M. they left Metlakatla, Alaska, on said tug-boat, with said Elliott in charge thereof as Captain and said Jones as engineer thereof, and that they proceeded on said tug-boat thereupon to the west side of Annette Island, upon which island said Metlakatla is situated, to a point about four miles from Metlakatla aforesaid, and less than two thousand

feet south of Cedar Point on said Island, and there saw a fish-trap in process of construction, situate in the waters of Alaska surrounding said Island and about two thousand feet from the shore thereof; and then and there saw a crew of men putting wire webbing on the hearts of said trap, new piling for which had recently been driven; that the webbing on the pot and spiller of said trap had already been placed thereon; that they also saw the tug-boat "William T. Muir" tied up near said trap, also then and there saw a pile-driver with no name thereon which affiants could discover, and also then and there saw the scow "Wanigian," but do [42] not know the names of the persons then and there working nor of the owners of said trap.

WALTER J. ELLIOTT,
EARL E. JONES.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal] C. Z. DENNY,
Deputy Clerk of District Court, Dist. of Alaska, Division No. 1.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of P. E. Harris, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
First Division, at Ketchikan.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of P. E. Harris.

United States of America,
District of Alaska, Ketchikan,—ss.

P. E. Harris, being first duly sworn, on oath deposes and says: That he has heard read the affidavits of Walter J. Elliott and Earl E. Jones, copy of which is hereto attached, and knows the contents thereof. That within sixty days prior to the date hereof, the exact date he not being able to state, he had a conversation with Mr. Tom Heckman in the Stedman Hotel in Ketchikan, Alaska, concerning the trap mentioned in the attached affidavit; that said Tom Heckman is the Superintendent, Manager or Foreman of the Alaska Pacific Fisheries, a corporation, and in said conversation said Tom Heckman told affiant that his Company, to wit: [43] said Alaska Pacific Fisheries, was constructing said trap, and asked what he, Mr. Harris, intended to do in the matter, and affiant then and there told said Heckman that it was up to the Government of the United States; said Heckman then and there told

affiant that he, Heckman, had instructions to continue the construction of said trap from said Company or corporation, and that he, Heckman, also wanted to drive another trap for said corporation in said waters; that said Heckman, at that time said he knew about the lease then existing between the United States and affiant, and of the proclamation of the Government about to be published in regard thereto, and that his said Company also knew thereof.

P. E. HARRIS.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal]

C. Z. DENNY,

Deputy Clerk of District Court, District of Alaska,
Div. No. 1.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of Harry F. Geil, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First
Division, at Ketchikan.*

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of Harry F. Geil.

United States of America,
District of Alaska, Ketchikan,—ss.

Harry F. Geil, being duly sworn, on oath deposes and says: That during the first week of May, 1916, the exact date I am unable to state, I was at the west shore of Annette Island in the [44] First Division of Alaska, and then and there I saw the piling for a complete fishing trap which had just prior to that time been driven; that said trap was and is within three thousand feet of the shore of said Annette Island, and was and is approximately within two thousand feet therefrom, and said trap is purported to have been erected by the Alaska Pacific Fisheries, a corporation.

HARRY F. GEIL.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal]

J. W. BELL,

Clerk of District Court, Dist. of Alaska, Division
No. 1.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of Edmund Verney, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First
Division, at Ketchikan.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of Edmund Verney.

United States of America,
District of Alaska, Ketchikan,—ss.

Edmund Verney, being first duly sworn, on oath deposes and says: That I am a Metlakatlan Indian, residing on Annette Island; during the year 1915 I was the Mayor of Annette Island; Annette Island has been my home ever since it was made a Reservation by Act of Congress approved March 3, 1891, to which Act reference is hereby made; that there have never been any fish-traps driven in the waters surrounding said Annette Island until the year 1914; during the year 1914 a trap was driven at Annette Point on the southeast short of said Island by John Davis & Son [45] who are Metlakatlan Indians, on a permit issued by the Secretary of the Interior of the United States, and under the authority and by virtue of said permit, permission to maintain said trap for one year being granted thereby, and permission to maintain said trap for another year, to wit, for 1915, was thereafter granted under the authority of the said Secre-

tary of the Interior; that in the year 1915 three permits were granted to Metlakatla Indians, to wit, Charles Brendible, Harry Lang and said John Davis and Son, to drive and maintain fishing traps for that year on the west coast of Annette Island, and I signed said permits as said mayor under authority of said Secretary of the Interior; that permission was never granted to any white man to drive or maintain any fish-trap in the waters surrounding Annette Island aforesaid; that no person other than a Metlakatlan Indian ever attempted to drive or maintain any fish-trap in said waters until the year 1916, during which year I am informed and believe that the Alaska Pacific Fisheries, a corporation, composed of people other than Metlakatlan Indians have driven and are maintaining a fish-trap on the west shore of Annette Island aforesaid, at Cedar Point; that the rights of the Indians residing on said Annette Island have always been maintained by them and respected by other people until the year 1916, when said Alaska Pacific Fisheries, a corporation, have claimed the right to have, constructed and maintain a fish-trap at said above-mentioned locations; and this last-mentioned instance is the first in which the right to drive and maintain fish-traps in defiance of the rights of the United States and of the Indian residents of said Annette Island under said Act of Congress approved Mar. 3, 1891, and of the subsequent proclamation of the President of the United States, dated April 28, 1916, has been attempted.

EDMUND VERNEY.

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal]

D. NOLL,

Notary Public for Alaska.

My commission exp. Nov. 1, 1917. [46]

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of D. Noll, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
Division No. 1, at Ketchikan.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of D. Noll.

United States of America,
Territory of Alaska, Ketchikan,—ss.

D. Noll, being first duly sworn, on oath deposes and says: I am an assistant United States Attorney for the First Division of Alaska; I have heard read the complaint herein and know the contents thereof; that the lands and waters mentioned in said complaint are lands and waters of the United States, and are situated in southeastern Alaska, and are within the jurisdiction of this Court. That the said Annette Island and the whole thereof and *and* nearby islands has been made and is a reservation for the use of the Metlakatlan Indians and such other natives of

Alaska as may join them, which includes *ex necessitate* the waters surrounding the same and appurtenant thereto, and reserved from the use or occupation of any other person or persons, whatsoever. That said islands and the waters appurtenant thereto have been since the formation of said reservation in the sole, exclusive and peaceable possession of this plaintiff and said Metlakatlans. That plaintiff has for many years aided and assisted said Metlakatlans to develop along educational and industrial lines and in the matter of self-government, and as a part of such system of advancement is now encouraging and assisting them to engage in commercial fishing and the canning for commercial purposes of fish. That no person other than said Metlakatlan Indians has, [47] ever since the making of said reservation, been permitted by plaintiff to establish any fishing plants in the waters appurtenant to and surrounding said reservation. That the plaintiff has now made further arrangements for the upbuilding of said fishing industry for the benefit of said Metlakatlans, and has encouraged them to drive traps for the purpose of catching fish in said waters, and to permit interference by others and to allow the maintenance and operation of other traps or structures in said waters would be disastrous to said plans of plaintiff. The defendant for the purpose, among others, of thwarting the plaintiff in its said plans and arrangements, and of annoying, harassing and injuring plaintiff therein, and destroying said scheme and injuring said Metlakatlans, has driven a fish-trap on the west coast of said reservation at or near Cedar Point, and now

threaten, unlawfully and without right, and in defiance of plaintiff's rights and the rights and interests of said Metlakatlans, and after full knowledge and notice thereof, to maintain and operate the same, which if at all permitted will cause irreparable damage and injury to plaintiff and said Metlakatlans. That the erection of said trap is in violation of the Act of Congress approved March 3d, 1899, as set up in the complaint herein, in this, that no harbor lines have ever been established at Annette Island or on said reservation, and said trap is constructed in the waters of the United States without any authority from the Secretary of War, either prior or since the beginning of the same, and without the submission of any plans thereof or the approval thereof by the Chief of Engineers or said Secretary, and the plaintiff is entitled to a writ of injunction from this Court, preventing the maintenance thereof.

D. NOLL.

Subscribed and sworn to before me this 1st day of June, 1916.

[Seal]

C. Z. DENNY,

Deputy Clerk of District Court, Dist. of Alaska,
Division No. 1. [48]

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of D. Noll, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First
Division, at Ketchikan.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of D. Noll.

Territory of Alaska,
Ketchikan Precinct,—ss.

D. Noll, being first duly sworn, deposes and says that he is Assistant United States Attorney for the First Division, District of Alaska; that pursuant to instructions from the United States Attorney for the First Division, District of Alaska, I went to Annette Island, Alaska, on the second day of May, 1916, and posted a notice on the fish-trap mentioned in the complaint herein and also delivered a copy of the same to Mr. Jack Meyers, a representative and employee of the Alaska Pacific Fisheries in the capacity of watchman of the said trap. Also that I mailed a copy of said notice to the said Company; receipt of which was acknowledged by the said Company by its attorney, C. H. Hanford, Esq., of Seattle, Washington. That the said notice so posted and delivered to the said defendant was as follows:

“Ketchikan, Alaska, May 2, 1916.

To Alaska Pacific Fisheries and Jack Meyers.

By virtue of a proclamation signed by the President April 28th, 1916, three thousand feet of waters contiguous to Annette Island, Alaska, has been set aside for the exclusive rights of [49] the Metlakatlans.

You are therefore hereby warned against trespassing on the said reserved area of waters and to cease driving or attempting to drive any traps for the purpose of catching fish within the said area and to cease fishing any traps within the said area.

D. NOLL,

Assistant United States Attorney.”

Subscribed and sworn to before me this 31st day of May, 1916.

[Seal]

J. W. BELL,

Clerk of District Court, Dist. of Alaska, Division
No. 1.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of Charles D. Jones, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska, First
Division, at Ketchikan.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of Charles D. Jones.

United States of America,
District of Alaska, Ketchikan,—ss.

Charles D. Jones, being duly sworn, on oath says: I am the representative of the United States Bureau of Education, at Metlakatla, Alaska, with general supervision over the natives on Annette Island reserve. That the Government of the United States has recently made arrangements whereby the native inhabitants of said reserve may engage in commercial fishing, and operate a canning industry on said reserve as part and parcel of the Government's plan to better and further the industrial as well as the educational condition of said natives, and in furtherance [50] thereof the President of the United States recently issued a proclamation limiting certain waters surrounding said reservation, the same being waters of the United States, to said purposes; said waters are the shore waters and those contiguously beyond surrounding said reserve, in which the inhabitants of said reserve, the same being at present Metlakatla Indians, have fished ever since the creation of the reserve; that no others than the Indian inhabitants of said reserve have ever driven fishing-traps along the shores of said reserve, and that only upon permits granted by the Secretary of the Interior of the United States and by his authority, and the first permit being in the year 1914, and the next issues of permits being in the year 1915; that none others have ever driven traps in said waters or fished therein.

or claimed rights therein as affiant is informed and verily believes, until the year 1916, when the defendants above mentioned began the erection of a trap on the west shore of said reserve near Cedar Point; that said defendant has been notified to cease operations at said point or in said waters, but has continued in defiance of said notice.

That the Government of the United States is now and for many years last past has been engaged in training the inhabitants of said reserve, with a view to making them industrious and self-supporting and self-governing, and said inhabitants place great reliance and faith in the said Government and in its plans and aims for them, so far as the same have been disclosed to them, and they feel that said defendant is a trespasser upon them and their waters and rights, and the moral effect of a continuance of said trap and the operation thereof in said waters will greatly weaken the Government in its endeavors in their behalf, and said reserve will be of little value to them if their fishing is encroached upon or taken away in any degree. That their greatest industry is fishing, and they will confine their fishing almost wholly to said waters if not molested.

CHARLES D. JONES.

Subscribed and sworn to before me this 31st May, 1916.

[Seal]

D. NOLL,

Notary Public for Alaska,

My commission exp. Nov. 1, 1917. [51]

Filed in the District Court, District of Alaska,

First Division, June 1, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of D. Noll, which was in words and figures as follows, to wit:

In the District Court of the United States for the District of Alaska, Division Number One, at Ketchikan.

No. 263—KA.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

PACIFIC ALASKA FISHERIES et al.,
Defendants.

Affidavit of D. Noll.

D. Noll, being first duly sworn, upon oath deposes and says, that he is Assistant United States Attorney for the First Division, District of Alaska; that on the second day of May, 1916, A. D., he posted a notice on that certain fish-trap in question in the above-entitled action and personally delivered a copy of said notice to Mr. Jack Meyers, the watchman at the said trap, and further duly placed in the United States Mail a copy of said notice, addressed to the Pacific Alaska Fisheries, a copy of which notice is hereto attached and made a part of this affidavit; that in reply thereto he received a letter from Mr. Hanford, dated at Seattle, Washington, a copy of which said letter is hereto attached and made a part of this affidavit.

D. NOLL.

United States of America,
District of Alaska,
Ketchikan Precinct,—ss.

Subscribed and sworn to before me this 12th day
of June, 1916, A. D.

[Seal]

J. FILLMORE WARDER,

Notary Public for Alaska.

My Commission expires Aug. 29, 1918.

Rec'd copy of above, June 15, 1916.

HELLENTHAL & HELLENTHAL. [52]

**Letter, May 17, 1916, Alaska Pacific Fisheries to
D. Noll.**

C. H. Hanford,
Attorney & Counselor at Law,
Colman Building,
Seattle.

May 17, 1916.

D. Noll, Esq.,
Assistant U. S. Attorney,
Ketchikan, Alaska.

Sir:

Responding the notice over your signature addressed to "The Pacific Fisheries Co. and Jack Myers "referring to a proclamation signed by the President setting aside for the exclusive rights of the Metlakatlangs waters contiguous to Annette Island, and warning the parties addressed," to cease trespassing on the said reserved area and waters and to cease driving or attempting to drive any trap or traps for the purpose of catching fish within the said area and to cease fishing any traps within the said re-

serve," it is hereby assumed that said notice was intended for the "Alaska Pacific Fisheries, a corporation," which has under license lawfully issued by the Territory of Alaska, constructed a trap at a location previously occupied for taking Salmon and intends to drive another trap at a location previously occupied in public waters outside of the line of low tide and will maintain its right to take fish at said locations notwithstanding your notice aforesaid.

Said corporation denies that the President has lawful power to extend a reservation beyond the boundaries prescribed by an Act of Congress or to include Public navigable water.

In one way or another the validity of the rights hereby asserted will have to be adjudicated and I respectfully suggest that since this business is in your hands to some extent, as appears by said notice, the most expeditious manner of making an issue will be for you to initiate judicial proceedings.

Whoever may without judicial process use force to destroy the property of the Alaska Pacific Fisheries or to impede its [53] fishing operations under its license will be held to accountability for such wrongdoing.

Respectfully,
ALASKA PACIFIC FISHERIES,
By C. H. HANFORD,
Attorney.

Filed in the District Court, District of Alaska,
First Division. Jun. 15, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of Ernest P. Walker, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
Division No. One, at Ketchikan.*

No. 1468-A.

No. 263-K. A.

UNITED STATES OF AMERICA

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.

Affidavit of Ernest P. Walker.

Territory of Alaska,
Juneau Precinct,—ss.

Ernest P. Walker, being first duly sworn, on oath deposes and says: I am Inspector Alaska Service, Bureau of Fisheries, and, acting under such instructions from my Department to co-operate with the Department of Justice in preventing the operation of the trap of the defendant herein at Annette Island and to proceed to the location thereof for the purpose of making investigations as to the conditions. I went to Annette Island and ascertained the position and location of said trap and found that the said trap is situated in Smugglers Cove on the west coast of Annette Island at Cedar Point; that off shore at that point are situated numerous rocks and reefs for some considerable distance waterward. That this trap is, as nearly as I could ascertain by

[54] sighting, practically entirely within the headlands of Smugglers Cove; that in sighting I was practically at the line of mesne low tide off Cedar Point and sighted to a like point on the southern headline of said cove; that had I sighted from the reef at Cedar Point the said trap is entirely within said Smugglers Cove. The lead of said trap begins parallel with the main reef at Cedar Point and about 175 yards from the innermost point of the cove and the outer extremity of the trap from said innermost point of the cove is not to exceed 1780 feet distant and is wholly within the waters of said cove measured from the reef aforesaid to the southern headland. That at the time I saw said trap, the heart walls were opened by means of shove-downs such as were used on fish-traps in the year 1914, and on account of which various prosecutions were had in this court. The tunnel thereof leading to the pot was closed. There is no way for a person having charge of said trap to weather the season without living upon said Annette Island. At present the watchman is on a small house scow anchored between the reef and the lead, but that arrangement would not afford protection in a storm.

I have marked out on a chart which I have signed "Ernest P. Walker—No. 1," the approximate position and location of said trap, and a line showing the 3,000 ft. limit mentioned in the President's proclamation, at Cedar Point, and I have also made a sketch of said trap, to measurement, which I have marked "Ernest P. Walker—No. 2," which may be used in connection with this affidavit.

There has never to my knowledge been any trap located at this point previously.

I made this trip and these investigations pursuant to telegraphic instructions from my Department as aforesaid.

ERNEST P. WALKER.

Subscribed and sworn to before me this 14th day of June, 1916.

[Seal]

INA S. LIEBHARDT,

Notary Public.

My Commission expires September 29, 1919.

Rec'd copy of above June 15, 1916.

HELLENTHAL & HELLENTHAL. [55]

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy.

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of John J Reagan, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
Division No. One, at Ketchikan.*

No. 1468-A.

No. 263-K. A.

UNITED STATES OF AMERICA

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.

Affidavit of John J. Reagan.

Territory of Alaska,
Juneau Precinct,—ss.

John J. Reagan, being first duly sworn, on oath deposes and says: that he is Assistant U. S. Attorney of the First Division of District of Alaska. That this suit was instituted by him on behalf of the Attorney General with his approval. That the affiant is informed by various Department employees and believes and therefore alleges that the matter of issuing the proclamation of the President herein was a subject of discussion between the War Department, the Interior Department, the Department of Commerce and the Department of Justice of the United States, and after due deliberation and consideration the President issued the proclamation herein. That the area of waters reserved by the said proclamation was with the consent of the Secretary of War, and the matter of placing traps therein by the Metlakahtla Indians was considered by the Secretary of War and permission given by the War Department for their erection whenever desired, and instructions thereto given in letter of May 13, 1916, written by the Secretary of War and addressed to the Secretary of the Interior, carbon copy of which is hereto attached and referred to in this affidavit. That for many years the Government of the United States through its proper departments has been engaged [56] in improving the habits and conditions of the Indians upon this reserve and

that for the purpose of encouraging the fishing industry among the natives and otherwise aiding them to advance in the ways of civilized life, industrially, educationally and commercially, the Government of the United States through its President has reserved the waters as described in the proclamation for the use and benefit of the Metlakahtlans and such other Alaskan natives as have joined or may join them in residence on these islands, to be used by them under the general fisheries laws and regulations of the United States as administered by the Secretary of Commerce, and warning was expressly given to all unauthorized persons not to fish in or use any of the waters therein described or mentioned. That the President of the United States is authorized by the laws of the United States to establish the limits of various of the Indian reservations and that in issuing the proclamation aforesaid he was in fact delimiting the outer water boundaries of the said reservation. That no permission has been given to the defendant or any other person other than those mentioned in said proclamation, to locate traps on said islands. That the said waters and the lands underneath the same belong to the United States; that they are navigable waters of the United States. That under the Act of March 3, 1899, it was made unlawful to commence to build any structure in any of the waters of the United States unless authorized by the Secretary of War prior to the beginning of the same and upon plans submitted to and approved by the Chief of Engineers and the said Secretary, except within established harbor lines, and that no

harbor lines have ever been established in any of the waters surrounding or adjacent to said Annette Islands. That said structure of said defendant is unlawful under the terms of said Act of Congress, that it interferes with the plans and objects and business of the Government of the United States and that it is a purpresture and should be abated by order and decree of this Court. That the said defendant is a trespasser within said [57] waters. That said defendants have threatened to continue the maintenance of said trap and to take therein the salmon fish of said waters and to convert the same to their own use, and threaten to drive other traps within said waters at other locations and threaten to take fish at said locations, notwithstanding the establishment of said reservation and the orders and proclamations of the President of the United States. And affiant states that said defendant will do so unless restrained and compelled to remove said obstructions and structures by the order of this Court. That the maintenance and operation of said trap upon said island and in said waters has a great deterrent effect upon the efforts of the plaintiff in behalf of its work and business with reference to the inhabitants of said reserve; that said inhabitants are Metlakahtlan Indians and within a lifetime were in a state of savagery, and their relations with the Government have been hindered and interfered with by reason of statements made to them by persons unfriendly to the purposes and objects of the plaintiff with reference to said inhabitants; and the plaintiff having communicated to said in-

habitants its purposes and objects in the premises, to now permit unauthorized persons to interfere adversely to the purposes of the Government in this behalf would cause a demoralization of said inhabitants and partial if not entire distrust of the plaintiff and its intention and power to carry out and fulfill its promises and purposes as herein set forth and would tend to wholly destroy the objects and purposes of the plaintiff in behalf of said inhabitants and cause said inhabitants to lose confidence in the Government of the United States.

JNO. J. REAGAN.

Subscribed and sworn to before me this 14th day of June, 1916.

[Seal]

INA S. LIEBHARDT,

Notary Public.

My commission expires September 29, 1919.

Rec'd copy of above June 15, 1915.

HELLENTHAL & HELLENTHAL. [58]

**Letter, May 13, 1916, Acting Secretary of War to
Secretary of the Interior.**

COPY.

WAR DEPARTMENT.

WASHINGTON.

May 13, 1916.

The Honorable,

The Secretary of the Interior.

Sir:

Referring to your letter of March 28th, 1916, transmitting a map showing the area around Annette and various other islands in Alaska, desired

to be reserved for the use of the Metlakahtla Indians, I have the honor to transmit herewith a chart on which is indicated by broken black lines the areas adjacent to Annette Island, to which fish-traps that the Metlakahtlans may desire to erect should be confined so far as practicable, in order that no obstruction to navigation may result. No traps should be placed in the buoyed channel immediately south of Annette Island, nor should access to the anchorages or the wharves at Ketchikan be obstructed.

Where this black line differs from the limits of the reservation laid out by the Interior Department, the limiting line of the reservation is indicated by red dotted line.

It is believed that favorable action without undue delay can be taken by this Department on applications by the Metlakahtlans for permission to erect and maintain fish-traps within the areas shown by the broken black lines. Applications for locations outside of those areas will however require an examination to determine whether or not they will interfere with navigation, before action can be taken.

Very respectfully,
(Signed) WM. M. INGRAHAM,
Acting Secretary of War.

One inclosure accomp. viz.: Chart, copy of 78187/317.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [59]

The plaintiff, to further maintain the issues on its part, read in evidence the affidavit of John J Reagan, which was in words and figures as follows:

*In the District Court for the District of Alaska,
First Division, at Ketchikan.*

No. 263—K. A.

No. 1468—A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, etc., et al.,
Defendants.

Affidavit of John J. Reagan.

United States of America,
Territory of Alaska, Juneau,—ss.

Jno. J. Reagan, being first duly sworn, on oath says: That he is the Assistant United States Attorney, who appears on behalf of the plaintiff in this hearing on order to show cause. That for many years prior to the commencement of this suit one William Duncan was, by permission of the plaintiff, engaged on the reserve mentioned in this action in teaching the inhabitants thereof; that for some years there had been a disagreement between him and the plaintiff in regard to the affairs upon said reserve, which resulted finally in the plaintiff assuming all control of affairs on said reserve; that growing out of said disagreement said Duncan used every means in his power to destroy the faith of the inhabitants of said reserve in the plaintiff, and in its

motives, aims and powers, and has a small following upon said reserve whom he is able to so control; that said reserve was made for the use of the Metlakatlangs and native Alaska Indians who might join them upon said reserve; but the defendant since the beginning of this action through its agents has invaded said reserve and has circulated a form of affidavit of which the attached paper is a copy, and has endeavored to get some of the inhabitants of said reserve to sign same, and affiant is uninformed [60] as to how many signers said defendant procured thereto; but states that it might be possible to get those so controlled by said Duncan or some of them to so sign and not others; that the trespassing upon said reserve by said defendant as aforesaid upon the heels of its defiant entry into said reserve and its meddling with the plans and business of the plaintiff is one of the evils that it is the object of this bill to prevent and to keep off from said reserve, not only for a time, but altogether all persons not authorized to enter thereon and thereby prevent them from interfering with the plans and business of the Government thereon. That owing to the said opposition hereinbefore mentioned, and after the plaintiff had assumed control of said reserve affairs, a cannery that had been upon the reserve was fired by some incendiary and destroyed, and as affiant is informed and believes for the purpose of further thwarting and opposing the plaintiff in its said business, and affiant is informed and believes and therefore states that arrangements have already been made for the building immediately of another can-

nery and other factories upon said reserve, and the presence of the defendant thereon and its activities is a trespass and a damage to this plaintiff which cannot be remedied except by the order of this court continued as prayed.

JNO. J. REAGAN.

Subscribed and sworn to before me this 15th June, 1916.

[Notary's Seal] INA S. LIEBHARDT,
Notary Public for Alaska.

My commission expires September 29, 1919.

Rec'd copy of above June 15, 1915.

HELLENTHAL & HELLENTHAL.

**Blank Form of Affidavit Referred to in Affidavit of
John J. Reagan.**

*In the District Court, for the Territory of Alaska,
Division Number One, at Ketchikan.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants. [61]

United States of America,
Territory of Alaska,
At Ketchikan,—ss.

We, the undersigned being severally duly sworn, each for himself and not one for the other, on oath deposes and say:

That he is now a resident and has been a resident

of the town of Metlakatla for many years, immediately last past; that the said town of Metlakatla is situate upon Annette Island, in the Territory of Alaska, and within the jurisdiction of this Court.

That on account of the Salmon Cannery at Metlakatla being recently destroyed by fire, and as said cannery will not be rebuilt during the present year, the residents of Metlakatla and the Annette Islands, will in no way be injured by the catching of salmon or other fish in the fish-trap now driven and completed at Cedar Point off the westerly shore of Annette Island, at about four miles in a westerly direction, from the said town of Metlakatla, during the fishing season of the present year, but on the contrary the operation of said fish-trap during the present year will be highly beneficial to the inhabitants of the said town of Metlakatla and the Annette Islands, for the reason that the fish caught in said fish-trap will supply the Chomley cannery with Salmon during the present fishing season, such cannery being only some thirty miles from said Metlakatla;

That the said cannery at Chomley gives employment to Metlakatlans while being operated, as the owners of said cannery have always furnished employment during fishing seasons to all Metlakatlans applying for work at said cannery when in operation.

That he has recently since the commencement of the above-entitled action, heard many of the residents of the said town of Metlakatla discuss the matter of the Cedar Point fish-trap not being allowed to operate by the Government, and that the general

sentiment of the residents is strongly in favor of the trap being fished by its owners.

That he believes that if a vote were taken of Metlakatlans [62] at this time, as to whether or not the said Cedar Point fish-trap should be operated or closed, that the vote would be almost unanimous in favor of the operation of the said fish-trap.

Subscribed and sworn to before me this 11th day of June, A. D. 1916.

Notary Public for Alaska.

My commission expires —, 191—.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1915. J. W. Bell, Clerk.
By C. Z. Denny, Deputy.

Whereupon the PLAINTIFF RESTED. [63]

DEFENSE.

**Testimony of Charles A. Burckhardt, for
Defendants.**

BE IT FURTHER REMEMBERED, that the defendants, to maintain the issues on their part, called as a witness CHARLES A. BURCKHARDT, who, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is Charles Burckhardt?

A. Charles A. Burckhardt.

Q. You live at Yes Bay?

(Testimony of Charles A. Burckhardt.)

A. I do in the summer-time, during the fishing season.

Q. Do you know the Alaska Pacific Fisheries?

A. Yes, sir.

Q. You are president of that corporation, I believe? A. Yes, sir.

Q. Are you familiar with its properties in the Territory of Alaska? A. I am.

Q. What canneries does it operate in Alaska?

A. One at Chilkoot, one at Chomley and one at Yes Bay.

Q. Do you know where those canneries get their fish supply? A. Yes, sir.

Q. Do you know where Annette Island is?

A. Yes, sir.

Q. Do you know where Metlakahtla is?

A. Yes.

Q. Are you familiar with the waters surrounding Annette Island? A. I am.

Q. You have read the proclamation of the President reserving a strip of navigable water 3000 feet in width around Annette Island? A. Yes.

Q. You know where those waters are situated, included within that proclamation? A. I do. [64]

Q. You are familiar with the cannery and other appliances that used to be situated on Metlakahtla Island?

A. To some extent; I never was ashore on Metlakahtla.

Q. You were never ashore? A. No.

(Testimony of Charles A. Burckhardt.)

Q. You have seen them, however, in passing by?

A. Yes, I have seen the buildings.

Q. You have personal knowledge of the business and operations of the Alaska Pacific Fisheries?

A. I have; I am General Manager.

Q. And the canneries at Chomley and Yes Bay, I believe, are operated under your personal supervision? A. They are.

Q. Now, Mr. Burckhardt, where does the Chilkoot cannery get its supply?

A. From Lynn Canal and Icy Straits.

Q. No part of the fish supply of the Chilkoot cannery comes from the waters surrounding that island? A. They do not.

Q. Where does the Yes Bay cannery get its supply of fish?

A. From the waters in the vicinity of Yes Bay, Beahm Canal, Clarence Straits and from these traps in the water surrounding Annette Island.

Q. To what extent is the Yes Bay cannery supplied with fish from the waters surrounding Annette Island?

A. It would be pretty hard for me to give you an estimate on that; it would depend a good deal on how the fish are running, whether we would get them for our Yes Bay cannery or for our Chomley cannery; the two canneries are run pretty much together. We figured in making up our requirements for the season that out of these two traps we would get eight hundred thousand fish and they would go

(Testimony of Charles A. Burckhardt.)

to both canneries—the bulk of them would go to Chomley. [65]

Q. Some of these fish go to Yes Bay and the bulk of them go to Chomley? A. Yes.

Q. The bulk of the Yes Bay fish are caught in waters other than those surrounding Annette Island? A. Yes.

Q. The per cent of fish that are caught around Annette Island is comparatively small?

A. Yes, I would say somewhere about 10 per cent.

Q. What is the capacity of the Yes Bay cannery?

A. About 100,000 cases; we have made cans this year for 100,000 cases.

Q. In regard to the Chomley cannery, where is that situated?

A. Chomley cannery is on Chomley Sound, Prince of Wales Island, I would say about 30 miles from Annette Island.

Q. What per cent of the fish canned at the Chomley cannery are caught within the waters surrounding Annette Island?

The COURT.—Now, Mr. Hellenthal, you say within the waters surrounding Annette Island—

Mr. HELLENTHAL.—I mean within that reserve proclaimed by the President.

The COURT.—Very well.

A. I would say we figure on our estimated pack from Annette Island about 800,000 fish.

Q. When you say Annette Island—

A. I mean the waters.

Q. You mean the waters within 3,000 feet of the

(Testimony of Charles A. Burckhardt.)

shore, within this proclamation of the President?

A. Yes.

Q. What is the capacity of the Chomley cannery?

A. We have made cans there this year for 110,000 cases.

Q. What, if anything, has been done in the last year in regard to enlarging the Chomley cannery?
[66]

A. We have bought more machinery and made more cans this year.

Q. To what extent has the Chomley cannery been enlarged? A. 25,000 more fish.

Q. When did you commence the work looking towards the enlargement of this cannery?

A. Last February.

Q. When was the work completed?

A. During the spring—during this year.

Q. When was it completed with reference to the time the President's proclamation was issued?

A. It had all been completed—all our orders had been placed in the fall.

Q. All that work had been done prior to that time?

A. Yes, all our orders and all our obligations had been made during the fall.

Q. Now, what, if any, arrangements did you make with the view of getting fish for your Chomley cannery to meet its increased capacity?

A. This trap we put off Cedar Point.

Q. When did you take the first steps looking towards the construction of that trap?

A. It was some time in the month of August,

(Testimony of Charles A. Bureckhardt.)

I don't remember the date, we had a diver come up.

Q. August of what year?

A. 1915. I had a diver come up and I went out with the diver and Mr. Heckman, superintendent of the Chomley cannery; I had him go down and sound whether we could drive off of this location; we found we could, and decided to put the trap in. I had been down there several times during the season and watched the fish run and saw there were a great many fish struck in along past that area.

Q. You are thoroughly familiar with the waters in that locality? A. Yes, sir. [67]

Q. And from your observation know how many fish ought to be caught in a trap at that point?

A. Yes—that is, as near as one can tell.

Q. Now, after you had determined that the site was feasible,—you have already explained what you did in the way of looking into the fish run at that point, Mr. Bureckhardt, have you? A. Yes.

Q. What did you do in that regard?

A. I went down there several times with my boat, and laid off that shore there to watch the fish running along there.

Q. In what year was that?

A. That was last year; I went down there a couple of times the year before, but we didn't put it in last year, as we were not quite satisfied we could drive, and we finally struck on the idea of getting a diver and taking him up there.

Q. You were there in 1914 but you were not satis-

(Testimony of Charles A. Burckhardt.)

fied you could drive at that time and took a diver up in 1915? A. Yes, sir.

Q. What did you do after that, Mr. Burckhardt?

A. Ordered our piling and webbing for that trap.

Q. When did you order that? A. Last fall.

Q. That is the fall of the year, 1915?

A. 1915, some time during the month of October.

Q. Now, what did you do after that? Just tell the Court what you did in the way of building that trap—when you did it.

A. Well, the trap—I gave instructions to Mr. Heckman when he went north to drive that trap.

Q. When was that?

A. That was early in March.

Q. Of this year? A. Yes.

Q. When was the trap driven? [68]

A. I received a wire from Mr. Heckman on the 19th day of April that the trap had been completed.

Q. You don't know just when he started?

A. No.

Q. Now, when did you first learn of this proclamation of the President? A. On May 4th.

Q. How did you learn of it at that time?

A. I received a wire from the Assistant Secretary of the Interior advising me that the President had issued a proclamation setting aside the waters 3,000 feet surrounding Annette Island.

Q. Did you have any knowledge of the fact that the President intended to issue any such proclamation? A. I did not.

(Testimony of Charles A. Burckhardt.)

Q. Had you ever heard that the President was going to issue a proclamation until that time?

A. I did not.

Q. If you should be deprived of the right to operate that trap during the fishing season of 1916, Mr. Burckhardt, would you be able to put up your pack at your Yes Bay and Chomley canneries?

A. I don't think we would.

Q. To what extent would your pack be short at Chomley?

A. I figure that our entire pack would be short about 50,000 cases.

Q. That would be about the number of cases caught in that trap? A. Yes, sir.

Q. You have been in the fishing business for how many years, Mr. Burckhardt? A. Ten years.

Q. And are familiar with the habits of fish, and with the methods employed in catching fish?

A. Yes, sir.

Q. And know what quantity of fish a trap ought to catch under [69] given conditions?

A. Yes, sir.

Q. And you know how many fish this trap should catch? A. Yes, sir, under normal conditions.

Q. I want you to explain to the Court what kind of a trap it is—how it compares with the other traps in southeastern Alaska as to the number of fish that would be caught in it under normal conditions.

A. Well, it is a regular pile trap, double spiller trap and hearts, and lead of about 1,000 feet, and it

(Testimony of Charles A. Burckhardt.)

is placed where there is a good run of fish; a great many fish pass there—I think one of the best points I have ever seen.

Q. And the trap, in your judgment, ought to catch how many fish during the season of 1916?

A. That trap ought to catch 600,000 fish; I make that estimate because we have another trap on Gravina Island which I do not consider as good as this, and we caught that many fish there last year.

Q. What, if any, provisions have you made, and your company made, to pack the fish to be caught in that trap?

A. We have employed all of our labor, made our Chinese contracts, bought all of our supplies from our people.

Q. You have employed the labor and made your contracts with the view of making—

A. 110,000 cases.

Q. Now, tell the Court how many cases you would be short if that trap is not operated?

A. About 50,000 cases, as near as I can estimate under normal conditions.

Q. I would like to have you explain to the Court, Mr. Burckhardt, the way your labor is employed.

A. Our labor is employed by the season; all of the Chinese are employed at so much per case; the white men, some of them at so much a month; the foremen, superintendents and some of the [70] machinists are employed by the season.

Q. The contract you make with the Chinese labor is by the season at so much a case?

(Testimony of Charles A. Bureckhardt.)

A. Yes, sir.

Q. And you have to pay for that labor whether you put up that many cases or not? A. Yes, sir.

Q. As I understand, you have employed Chinese labor to put up 110,000 cases at Chomley this season?

A. Yes, sir.

Q. And if you should put up 50,000 cases less, you would have to pay that labor anyhow?

A. Yes, sir.

Q. Pay for the 50,000 cases whether you put them up or not? A. Yes, sir.

Q. How is that about other supplies?

A. Well, take, for instance tin plate; there would be some depreciation on our tin plate we would have to hold over, we would have our money tied up in that, and we would have our money tied up in boxes.

Q. There would be a depreciation but no absolute loss?

A. Oh, no, but there would be some loss in the tin cans—there would be more or less loss in the tin cans on account of their being over salt water, they are bound to rust, and when we have carried them over there has been some loss.

Q. What would be your loss at Chomley cannery if this injunction should be granted? I want you to state in round figures how much you would be damaged if you could not fish that one trap on Annette Island this season.

A. I would say we would be damaged to the extent of about \$50,000.

(Testimony of Charles A. Burekhardt.)

Q. I wish you would explain to the Court of what that damage would consist.

A. In the first place, we would lose about \$15,000 on labor, [71] and I estimate if we have to carry that number of cans over there would be a depreciation of 25 cents a case on cans, which would be \$12,500; and figuring on 50 cents a case as our profit, would be \$25,000, and we have our money for this 50,000 cases of cans and materials tied up—it would amount to something like \$75,000 in material, that we would lose interest on, and have to pay insurance on it, on the actual materials there; in round numbers our loss \$50,000—actually our loss would be over \$50,000, but I will say \$50,000 to be safe.

Q. How much money, in round numbers, have you paid out for this year's supplies for your canneries?

A. For Yes Bay and Chomley alone we have paid out about \$500,000.

Q. For Yes Bay and Chomley, without regard to the Chilkoot cannery? A. Yes, sir.

Q. For supplies that do not include labor and things like that?

A. That is supplies, material and advances on labor contracts.

Q. That is, your Chinese labor contracts?

A. Yes, sir.

Q. Now, your damage at Yes Bay, if this injunction is granted—what would that be?

A. I am taking the total, I am figuring it altogether.

(Testimony of Charles A. Burckhardt.)

Q. Now, you are familiar with the cannery at Metlakahtla, you say?

A. I am not familiar with the Metlakahtla cannery.

Q. You know there was a cannery there?

A. Yes, I have seen it going past in the boat.

Q. You know it has since burned down?

A. Yes, sir.

Q. Now, how long do you say you have been in the fishing and cannery business? A. 10 years.

Q. Do you know how long it requires to construct a cannery and get it in operation? [72]

A. Yes, sir.

Q. You know that cannery was burned down—you are familiar with that? A. Yes, sir.

Q. There is no cannery there now? A. No.

Q. Could a cannery be built at Metlakahtla if construction work was commenced now, and be gotten in condition to put up a pack this year?

A. It could not.

Q. Could any fish caught in the waters surrounding Annette Island or elsewhere be put up at Annette Island this year?

A. No, it could not, it would be impossible—even if they could secure the material, machinery and supplies it would be impossible.

Q. When do the fish commence to run, Mr. Burckhardt?

A. The fish are starting to run now; the big run is on from the middle of July to about the middle of August.

(Testimony of Charles A. Burckhardt.)

Q. When does it end?

A. The run is practically over by the first of September.

Q. Mr. Burckhardt, you are familiar with the waters in the vicinity of Cedar Point?

A. Yes, sir.

Q. And the locality of the trap? A. Yes, sir.

Q. How have you conducted your fisheries in the years gone by with reference to compliance with the laws in the construction of traps?

Mr. REAGAN.—I don't see how that is material in this case, if the Court please.

Mr. HELLENTHAL.—I will withdraw the question.

Q. What have you done, Mr. Burckhardt, in connection with the construction of this trap at Cedar Point as to complying with [73] existing acts of Congress in relation thereto?

Mr. REAGAN.—I object to that as immaterial.

The COURT.—Overruled.

Q. How is the trap situated with reference to other fish-traps—that is what I mean?

A. There is no other fish-trap near it.

Q. When you say near there, what distance is it to the nearest fish-trap? A. None within 4 miles.

Q. Either laterally or any other way, from the fish-trap? A. In no way.

Q. How is this trap situated with reference to the shore land of Annette Island?

A. It extends out into the channel, out into deep water.

(Testimony of Charles A. Burckhardt.)

Q. Is not up on the tide-lands? A. No.

Q. How far below tide-land?

A. It is driven below low-water mark.

Q. Considerably below low-water mark?

A. Yes, sir.

Q. Situated wholly in deep water? A. Yes, sir.

Q. Now, Mr. Burckhardt, what, if anything, have you been doing in your canneries in the way of employing the Metlakahtla Indians?

Mr. REAGAN.—I object to that as immaterial.

The COURT.—Overruled.

A. We have always given employment to natives of Metlakahtla; we have got a few of them in our employ at the present time.

Q. You have already employed some for this year?

A. Yes, sir; and they would have worked for us even if the cannery at Metlakahtla had been operated.

Q. If you should be deprived of the right to operate your [74] cannery at Chomley to its full capacity would you be able to employ as many of those natives as you would if it was operated to its full capacity? A. No, we would not.

Q. If you are allowed to operate the trap this season, during the pendency of this suit, where would you get your native labor from, to a large extent at least?

Mr. REAGAN.—I object to that as immaterial.

The COURT.—Overruled.

(Testimony of Charles A. Burckhardt.)

A. The Chomley cannery always get their Indian help from Metlakahtla.

Q. Always have? A. Yes.

Q. And intend to get them from there in the future?

A. Always have taken all we can get from there; one of the foremen of our cannery was Father Duncan's foreman in the Metlakahtla cannery, and ever since that cannery has not been operated he has been with us as foreman.

Q. How long since the Metlakahtla cannery has been operated? A. I think it is three years.

Q. Has it been operated since the Government deposed Father Duncan from there? A. It has not.

Q. If you should be prohibited from operating your Cedar Point fish-trap, Mr. Burckhardt, what effect will that have upon the employment of natives as applied to the natives of Annette Island?

A. We will not need as much help.

Q. You would not need as much help?

A. No; we probably would not need any Metlakahtlans at all this year, or very few of them, if we cannot get the fish.

Q. They would be deprived to that extent of employment?

A. As far as the cannery help is concerned. [75]

Q. You know, as a matter of fact, there is no cannery on Annette Island that could furnish them employment?

A. There is not, and there is no building there that could be used for a cannery.

(Testimony of Charles A. Burckhardt.)

Mr. HELLENTHAL.—I have a map here, your Honor, of that locality with Annette Island on it, Clarence Straits, Portland Canal, etc., and I want to offer that in evidence.

(Whereupon said map was received in evidence and marked Defendant's Exhibit No. 1.)

Q. What quantity of fish—about how many fish did you get from the waters surrounding Annette Island, within the President's proclamation, last year for the Chomley cannery?

A. About 300,000.

Q. In what trap were they caught?

A. In the trap known as the Brendible trap.

Q. Who owned that trap?

A. The Alaska Pacific Fisheries and Brendible.

Q. You were partners in the trap? A. Yes.

Q. And this trap you have now driven was driven to take the place of that one?

A. No, this trap is far below that one; that trap was up on the upper end of Annette Island.

Q. You need that trap besides?

A. Yes, sir.

Q. Can you get fish out of that trap?

A. We were stopped from driving that trap.

Q. You stopped operations as soon as the injunction was issued?

A. We didn't cease operations—as soon as the injunction was placed on us we couldn't go ahead.

Q. If no proceedings had been commenced against you, you would have proceeded to operate

(Testimony of Charles A. Burckhardt.)

that trap, also? A. Yes, sir. [76]

Q. That is the trap you got some fish from last year—300,000? A. Yes, sir.

Q. And also the previous year, Mr. Burckhardt?

A. No; last year only.

Q. Now, I call your attention to Defendant's Exhibit No. 1, and I wish you would mark on that exhibit with the letter "A" the point at which the Cedar Point trap is located—the trap in dispute in this case.

(Witness so marks map.)

Q. You are familiar with those waters, Mr. Burckhardt, I believe you have testified?

A. Yes.

Q. Now, how is that trap constructed with reference to its being an obstruction to the navigable capacity of the channel or an obstruction to navigation?

Mr. REAGAN.—I object to that as immaterial, if the Court please. The law says it shall not be built at all, without permission, no matter whether it is an obstruction or not; and it does not have to be an obstruction in order to come within the language and construction of the law.

The COURT.—That is immaterial, but I am disposed to let him testify on that if you lay the foundation for it, Mr. Hellenthal. I do not know now whether this witness knows anything about what is an obstruction to navigation and what is not.

Q. How was the trap constructed with reference

(Testimony of Charles A. Burckhardt.)

to its effect upon the navigable capacity of the channel?

A. The trap is right in front of a reef—a reef runs out there, and we maintain a bell and a light on the trap at all times; the bell is rung in foggy weather and the light is right there at night, and it is not an obstruction to navigation—there are no steamers pass there, anyway.

Q. Could it protect steamers from going on that reef?

A. In fact it acts more like a light-house for them than an obstruction; [77] it is an aid to navigation; I consider a fish-trap with lights is an aid to navigation; I have traveled around Alaska in boats and know that they are aids to navigation.

Q. You have traveled on ships about here a great deal yourself?

A. Yes, sir; I have traveled all over southeastern Alaska in my own boats as far as Cross Sound.

Q. You operate your own boats?

A. Yes, sir.

Q. In connection with your canneries?

A. Yes, sir.

Q. And have spent a good deal of time on those boats?

A. Yes, sir; I am on the boats nearly all summer; spend very little time at home.

Q. How does that trap protect any ship from going on that reef?

A. There is no ship has any business going in there.

(Testimony of Charles A. Burekhardt.)

Q. Would they be apt to get into trouble if there was no trap there?

A. They would be more apt to get into trouble if that trap wasn't there, because when they saw that light they would know there was something there.

Q. If the light wasn't there they would be more apt to go on that reef?

A. Whenever a master of a vessel sees a light he will keep away from it.

Q. How wide is the channel at that point?

A. Well, it is pretty wide—about 12 miles.

Q. Across the channel. How wide is it in the vicinity of the trap—is the water very rocky?

A. Yes, it is rocky; you can see the rocks all along the shore in through here. (Referring to map.)

Q. Would it be dangerous for a ship to go in there? A. Yes, sir.

Q. And the trap has the effect of warning them of the existence [78] and locality of those rocks?

A. Yes, sir.

Q. I think you have already stated that you have a bell on the trap, operated in foggy weather, and the light at night? A. Yes, sir.

Q. That is maintained there all the time?

A. Yes, sir.

Q. Now, you have been engaged for many years, I believe you testified, in the fishing business—do you know what devices are usually employed in catching salmon in the Territory of Alaska?

A. Traps, seines and gill nets.

Q. To what extent in southeastern Alaska are

(Testimony of Charles A. Burekhardt.)

traps employed in supplying canneries with fish?

A. Well, that would be pretty hard for me to say, I would be guessing at it; I don't know.

Q. Give your best estimate as to what per cent of the fish in southeastern Alaska are caught in traps.

A. I would say close on to 75 per cent of the fish that are gathered in southeastern Alaska are caught in traps.

Q. And what do you say as to your trap that you have at Cedar Point being the usual and ordinary device employed in catching fish here?

A. Yes, sir; it is the usual ordinary device.

Q. It is the usual ordinary device?

A. Yes, sir.

Q. It is the trap generally employed?

A. Yes, sir; it is a regular trap that is used around in this district.

Q. The same kind of a trap as is used by other fishermen throughout this district? A. Yes, sir.

Q. It does not differ particularly from other traps? A. No. [79]

Q. What is the cost of the trap—cost of driving it?

A. That trap, the cost is in the neighborhood of \$4000.00.

Q. How long is the life of a trap?

A. Only one season; part of the web is good for two seasons, but practically the life of a trap is one year.

(Testimony of Charles A. Burckhardt.)

Q. Piles go out every year? A. Yes.

Q. If you are not permitted to fish the trap this season, the trap itself would be a total loss to you?

A. Yes, sir.

Q. There would be no trap there next year?

A. No.

Q. I hand you here, Mr. Burckhardt, a map, marked for identification Defendant's Exhibit No. 2, and ask you to look at that and state if you know what it is.

A. It is a map of the fish-trap location at Cedar Point.

Q. Made by an actual survey upon the ground?

A. Yes, made by Mr. Ryus.

Q. And that shows accurately the place at which it is located? A. Yes, sir.

Q. The straight line there shown as the location of the trap, comes even with the shore—the trap, however, as I understand your testimony, does not extend the whole length of that straight line?

A. No, sir; they take their marks to get the survey, and they had to have shore marks, and for that reason we had to show that line, and then go out to a spruce tree, and here is another one (indicating.)

Q. Now, will you take your pencil, Mr. Burckhardt, and mark on there approximately where the trap would be with reference to the shore?

A. I could do it only approximately, it is not to scale. Now, say, this is the lead, supposed to represent 1,500 feet, I would say that it was approximately there (indicating.) [80]

(Testimony of Charles A. Burekhardt.)

Q. Will you mark that with the letter "B"?

(Witness so marks map.)

Q. Mark the other side of the trap with the letter "C"—the seaward side of it.

(Witness does so.)

Q. The trap, then, is approximately between B and C on that line?

A. Yes, approximately; it is probably over the C—probably comes out farther than that, I would say, about here would be the end of it (indicating).

Q. How near the shore is the seaward side of the trap—approximately how many feet from shore is it? A. The end of the trap?

Q. How far to the seaward is the shoreward end of the trap from the line of ordinary high tide, approximately? A. About 600 feet.

Q. Now, how far to the seaward is the shoreward end of the trap from the line of extreme low tide, approximately? A. How far out?

Q. How far to the seaward?

A. From extreme low water?

Q. Yes.

A. Somewheres close on to 200 feet—you mean where the lead begins?

Q. Yes, the point that is nearest the shore.

A. How far the lead is from low-water mark?

Q. Yes.

A. I would say approximately 200 feet.

Q. There is no part of the trap, then, situated closer than 200 feet to the line of extreme low water along the shore of Annette Island? A. No.

(Testimony of Charles A. Burekhardt.)

Q. And no part of the trap is situated nearer than 600 feet from [81] ordinary high tide?

A. No.

Q. Is any part of the trap built on tide-land or flats?

A. No; the trap is all outside of the low-water mark.

Q. In deep water? A. Yes, sir.

Q. In deep water and not on the tide-land?

A. Yes, sir.

The COURT.—The lead and all?

A. Yes; there is none of the lead on high-water mark; it is all below low-water mark.

Q. Is any part of the trap attached to the island at all? A. No.

Q. Do you make any use of the shore or tide-lands? A. No.

Q. None whatever? A. No.

Q. You remain entirely in deep water?

A. Yes, sir.

Q. Your watchman, how does he stay there?

A. He stays there in a house-boat on a scow; he has strict orders to remain off the Island—to take nothing from the Island.

Q. Is there any intention on your part to enter that Island or go upon that Island? A. No, sir.

Q. Or extend a lead from shore, or go anywhere near the Island? A. No, sir; we don't.

Q. Any nearer than 200 feet below low-water mark? A. No, sir; we don't.

(Testimony of Charles A. Burckhardt.)

Q. Would the operation of your fish-trap in any way effect the Island itself? A. No, sir.

Q. Would it obstruct access from the deep water?

[82] A. No.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. REAGAN.)

Q. The name of your Superintendent is what, Mr. Burckhardt? A. T. A. Heckman.

Q. How long has he been superintendent?

A. He has been in my employ as superintendent since 1908.

Q. That would be 8 years? A. Yes, sir.

Q. He is familiar with conditions around there, is he? A. Yes, sir.

Q. Did he tell you he had been employed by Brendible to make a survey of the trap site?

A. No, sir.

Q. You didn't know that? A. No, sir.

Q. Did you ever hear of it? A. No, sir.

Q. Not at all; and you say he had charge of the operations for the survey of this trap site?

A. Yes, he had charge of them; I was there with him.

Q. Who suggested this site, you or he?

A. I did.

Q. How did you know about it?

A. I had been around there and I had seen it and saw that it was a likely place.

(Testimony of Charles A. Burckhardt.)

Q. Do you know whether he made a survey for Mr. Brendible?

A. Not at that point—he did at the upper end. We had a diver in the spring come up and sound this location that the Brendible trap was in—that was near Walden Rocks—I wasn't present at the time.

Q. Then you don't know where it was, do you?

[83] A. I do know, yes.

Q. How do you know if you were not there?

A. Because they told me where it was, and the trap was put there.

Q. So if Mr. Heckman did discover this trap by reason of having been employed by Brendible to survey it, you don't know anything about it?

A. I know nothing about it, no; I never heard anything about it before.

Q. When was that cannery built at Chomley?

A. In 1911.

Q. When was the cannery built at Yes Bay?

A. It is one of the oldest canneries in Alaska—I think in 1908.

Q. Now, you say you have only been getting fish out of the waters within 3,000 feet of Annette Island last year? A. Yes.

Q. How did you get those fish?

A. Got those out of the Brendible trap.

Q. What was the process under which that trap was put up—I mean the legal process, if there was any?

A. We furnished the material and the webbing;

(Testimony of Charles A. Burekhardt.)

Mr. Brendible got out the piling in the winter-time; we paid him for the piling, and he did all of the work; we employed him and his son as watchmen on the trap, and paid them for their services; we took the fish and credited the fish to the trap at the prevailing prices we were paying others, and the profits were to be divided; but there was a loss in the trap last year and there was no profits, but he was paid for his services as watchman the same as we paid the other one, and he also was paid for his trap piling which he got out in the winter-time.

Q. Now, in order to operate that trap it was necessary to get a permit from the Annette Council, wasn't it? A. I don't know. [84]

Q. You never had anything to do with that?

A. No.

Q. Why didn't you drive the trap instead of paying Brendible to do it?

A. It was Brendible's location, and he wanted to know if we would drive it and furnish the material, on that kind of an arrangement, which we did.

Q. Isn't it a fact to your knowledge that the only way traps were driven on that Island at all until this year, until you drove yours, was this way, that a native of Metlakahtla Island gets a permit from the Secretary of the Interior or from the Annette or Metlakahtla council for the construction of a trap?

A. If they want to drive right at the shore.

Q. And they have always gotten those permits?

A. I never had anything to do with that part of it.

Q. And nobody but a native is allowed to build

(Testimony of Charles A. Burckhardt.)

a trap there, or to get a permit for a trap?

A. I don't know anything about that; the only thing I know is that Brendible came to Mr. Heckman, and Mr. Heckman came to me, with this proposition as I outlined it here, and said Brendible had found this location and was anxious that somebody should help him put the trap in, and wanted to know if the proposition was agreeable to me.

Q. Why didn't you drive the trap on your own account and leave Brendible out of it?

A. We don't do business that way.

Q. Cannery men don't do that?

A. I don't think so; I never heard of cannery men being any bigger robbers than anybody else.

Q. You haven't heard of any litigation either here or at Ketchikan about the jumping of traps?

A. We haven't had any. [85]

Q. Now, Brendible didn't have a stick driven in that ground, did he?

A. That doesn't make any difference. Mr. Brendible came to our man, Heckman, and told him he had this location and asked him if he would get the money or furnish the material to put in a trap, and we said we would, which we did. What do you want us to do—find out what he had and then go and steal it from him?

Q. I am not answering your questions, you answer mine. If Brendible also discovered this point at Cedar Point and got Mr. Heckman as surveyor to survey the trap—

(Testimony of Charles A. Burckhardt.)

A. I told you Mr. Brendible did not discover that site, that I discovered that site, and this trap was driven at my instigation—I told Heckman I wanted him to drive that trap.

Q. Is Mr. Heckman present?

A. No, he isn't here, we couldn't all be up here—I am sorry he is not here.

Q. You made an arrangement with Brendible—first Brendible looked at a place he thought would be a good site for a trap and because of that discovery you made an arrangement with him that you would pay him for the piles that he himself took out, that you would pay for the trap, that you would pay him a salary, and also his son, and that you would divide the profits from the trap? A. Yes, sir.

Q. And you did that without any permit being granted by the Annette council?

A. I don't know anything about that.

Q. You didn't know that the Annette Council grants permits for the building of fish-traps?

A. No.

Q. You didn't know that the Secretary of the Interior grants permits? [86]

A. No.

Q. How many years have you been in the fishing business? A. About ten years.

Q. And you never went on Annette Island in all that time?

A. I never have been on the Island—I have passed it in my boat.

Q. You never were on the Island while Father

(Testimony of Charles A. Burckhardt.)

Duncan was operating that cannery there?

A. I never went on the Island while Father Duncan was operating that cannery.

Q. Why not?

A. Because he did nothing but seine fishing—the fishing business has changed—we are driving farther to the sea; the Yes Bay and Chomley canneries are located in bays, and the other canneries have gone out below us and put in traps and catch the fish before they strike our traps and we have hard work to get fish, and that is why we got down in this District.

Q. In other words, the waters are fished out and you have to get farther away?

A. They are catching the fish before they get up to the streams; in the old days there were no traps in that district; the fish were all caught by the natives with seines, but now the fish are getting scarcer—other canneries have come in and driven traps below us and there are not as many fish come up to the bays as used to come.

Q. The result of all that you have said is that the waters have become depleted of fish and that you have to go farther away to catch them?

A. Yes, the waters become depleted out at the other end.

Q. What end do you mean?

A. Up at the end where the fish used to be caught in seines.

Q. How long have you been using traps to catch fish? A. Since 1907. [87]

(Testimony of Charles A. Burckhardt.)

Q. Now, since you began using traps in 1907, you used them first in the vicinity of your cannery at Yes Bay? A. Yes.

Q. And now you have to go farther away from Yes Bay? A. Yes.

Q. Why is that?

A. Because others have put in traps below us.

Q. And your traps won't catch any more fish?

A. There is not enough fish caught,—

Q. In other words, there is not enough fish, and as you said a few minutes ago, you have to go farther out to sea? A. Yes.

Q. And that is the fish history of this country, isn't it?

A. I think it is; the fish are in primer condition the nearer you get to the sea—they are better fish.

Q. If you will please pay attention to what I say and just answer my questions we will get along better—I just want facts.

A. I am giving you facts as near as I know them.

Q. If that is true, the operation of fish-traps around Annette Island will soon get to a point where you will have to move farther from Annette Island?

A. You cannot move farther from Annette Island.

Q. Why not?

A. Because there is nothing below you, unless you go to Duke Island.

Q. You cannot go any farther? A. No.

Q. That is the last place you can go to?

A. About as far as you can go.

(Testimony of Charles A. Bureckhardt.)

Q. If you fish it out the natives won't have anything left, will they?

A. Do you think I am going to fish it out?

Q. You answer my questions—I am not here to answer yours. [88] You say this is the last place you can go, therefore if you fish it out the natives won't have any fish left, will they?

A. What is the difference whether I am catching the fish over here or over here? (Indicating).

Q. I wish you would answer my question.

A. I cannot answer that question. Ask me the question once more and I will see what it is.

Q. I say if you continue to fish there in those waters, and the same rule applies as to the fish getting farther away so that you have to go farther out to sea, there will soon be a time when you will have to go away from Annette Island—

A. You cannot go any farther.

Q. If you cannot go any farther that will end the fish business, won't it?

A. The fish are always going to come in; the fish come along the shores of Annette Island—that is their traveling ground,—they come along there and the tide sets them in close to the shore.

Q. The same rule, as I understand you, then will not apply to the fish swimming in the waters of Annette Island, that applies around Yes Bay, where you first started your traps, would it?

A. I don't think it will.

Q. Why not?

(Testimony of Charles A. Burckhardt.)

A. Because there is no chance to get below with many traps.

Q. That is a guess, isn't it?

A. No, it is not any guess.

Q. You haven't tried it out, have you?

A. We have had divers down below, yes, sir.

Q. That is contrary to all the other fish habits that you have learned, isn't it?

A. There are fish there—there are fish way below there—there are fish that come around Cape Shakon, but you cannot hold a trap there because the weather is too rough. [89]

Q. How much money did you expend on your cannery at Chomley last winter?

A. Last fall and last winter?

Q. Yes, I will add the fall too.

A. Well, it is pretty hard for me to tell you that offhand; I haven't my records with me.

Q. You have never operated a trap at Cedar Point before, have you? A. No.

Q. How do you know how many fish you are going to get in that trap?

A. According to my knowledge of the business; we prepare our packs at our canneries for the amount of gear we put out; we might make a mistake, but then everybody makes mistakes sometimes.

Q. You may make a mistake by a great many thousands of fish, might you not?

A. Yes, that is true; but we figure on so many cases, and we have found out that it requires so much

(Testimony of Charles A. Burckhardt.)

gear for that amount of profit.

Q. And if you don't come up to your expectations you suffer a loss? A. Yes, we do.

Q. That is the ordinary loss of business, isn't it?

A. We don't very often fall down.

Q. Sometimes you build traps that don't come up to your expectations, don't you?

A. Yes, sir; certainly.

Q. And that is an ordinary loss of business, isn't it? A. Yes.

Q. And sometimes you build a trap and it is taken out by the tide or storm?

A. I have heard of that, yes, but I have never had one taken out. [90]

Q. You know that such things happen?

A. Yes.

Q. Therefore if you build a trap you are not entitled, according to the laws of business, to absolutely depend upon a profit from that trap, are you?

A. There is no storm that can take that trap out at Cedar Point.

Q. It would be an ordinary business loss, wouldn't it? A. If the trap didn't catch any fish?

Q. Yes. A. Certainly would.

Q. Or if it was taken out by a storm?

A. It would be together on account of the storm.

Q. And if you built it there without lawful authority, if that should happen to be the conclusion of the Court, so you could not do business there and could not fish that trap, that would also be an ordi-

(Testimony of Charles A. Burckhardt.)

nary business loss, wouldn't it?

A. I wouldn't consider it so.

Q. Now, how much enlargement did you say you made to your Chomley cannery?

A. About 25,000 cases.

Q. I am not asking about cases, I am asking about the absolute addition you made to the building.

A. We have increased our capacity at the cannery so we can handle 25,000 cases more than we did the year before.

Q. And that increased capacity is an asset your company has?

A. It is an addition in buildings, and an addition in machinery.

Q. How much addition of buildings did you put there?

A. I think the expenditure was something like \$3,500.00.

Q. What did you do—build an addition of some kind? A. Yes, sir.

Q. An extra room?

A. I think that is what it was.

Q. How much of a room was it?

A. I don't know. [91]

Q. And you spent in the actual addition of the plant—

A. \$3,500.00, about—that is, as far as that is concerned.

Q. How much additional machinery did you buy?

A. I would say, offhand, somewheres around \$15,000.

(Testimony of Charles A. Burekhardt.)

Q. What was that machinery?

A. Coolers, seamers and butchering machines.

Q. That is all good material, isn't it?

A. Yes, it is good material when you can use it.

Q. Suppose you didn't catch any fish at all in your traps, it would be good machinery just the same, wouldn't it? A. Wouldn't be much good.

Q. And you would have to dispose of it in the ordinary course of events the best way you could. When you bought that machinery you bought it with the expectation of having use for it? A. Yes, sir.

Q. And if you didn't catch any fish at this particular point you would try to use it at some other point, wouldn't you?

A. As I stated before, when we figured our improvements and our enlargements of our plant at Chomley and our supplies for this year, we took into consideration these new traps we were going to put in and the additional fish we would get from these traps.

Q. Now, you estimated to Mr. Hellenthal that you would take 800,000 fish out of this trap this season?

A. Yes, sir.

Q. Now, if that 800,000 were caught by the natives and sold to you—

A. I didn't say 800,000 out of that trap,—I said 800,000 out of the two traps.

Q. Well, if the natives caught those fish and sold them to you they would be better off than if they worked for you for wages, wouldn't they? [92]

(Testimony of Charles A. Burckhardt.)

A. They surely would, but they cannot catch the fish by seines; they are traveling fish, not in schools, and they cannot be caught in seines.

Q. They could be caught by other appliances, couldn't they?

A. There is nothing they can be caught in except by a trap; we have had seines down there and couldn't catch any fish with them.

Q. Did you know there was an arrangement made for the operation of that fishing industry at Annette Island, by which Mr. Harris was appointed by the Government for the purpose of operating that cannery?

A. I knew they contemplated making a lease.

Q. Did you know what the terms of that lease were? A. I did not.

Q. Didn't you know it was somewhat similar to the arrangement you had with Brendible last year?

A. I did not; I didn't know anything about the lease—I didn't know there was going to be a lease until this spring.

Q. And that lease was executed by the Government, and Mr. Harris was to operate that cannery—you would expect Mr. Harris would put in a trap himself, wouldn't you?

A. I don't know what he would do.

Q. You would expect him to do that, wouldn't you,—as a man who knows his business wouldn't you expect him to put in his own trap?

A. I don't know anything about what Mr. Harris would do.

(Testimony of Charles A. Burckhardt.)

Q. You know he is a cannery man, don't you?

A. I don't know that—I know he is in the fish business.

Q. Did you ever hear of a cannery at Hawk Inlet?

A. Yes, sir.

Q. Do you know who runs it? A. Yes.

Q. Who? A. Mr. Harris. [93]

Q. I thought you knew. Now, when you say that trap was completed on the 19th of April, what do you call a complete trap—just the driving of the piling, or do you call it a complete trap after the webbing is on, and the capping is on wherever you put caps, and it is in fishing condition?

A. I had a telegram from Mr. Heckman on the 19th of April that the trap at Cedar Point was completed.

Q. That is all you know about it?

A. I don't think he would telegraph me if it wasn't completed.

Q. If on the 21st day of May they were putting the webbing on the heart walls, and stringing some of the lead with webbing, then that trap was not finished on the 19th of April, was it?

A. They might have been out there patching the trap, or they might have been out there letting the web down—I don't know anything about that.

Q. But if two reputable witnesses testified that they were out there and saw them putting the web on the heart, and there is absolutely no reason to disbelieve them, then you would be mistaken as to

(Testimony of Charles A. Burckhardt.)

the trap being finished on the 19th of April, wouldn't you?

A. I don't know who these men are—whether they know a fish-trap when they see one.

Q. If they were there putting the webbing on the heart walls on the 21st of May, the trap wasn't finished on the 19th of April, was it?

A. If the web was not on the trap it was not completed, no.

Q. Now, you say you received information from the Secretary of the Interior in regard to this proclamation on the 4th of May?

A. From the Assistant Secretary.

Q. How did he come to notify you about it?

A. Because I was corresponding with him.

Q. How long had you been corresponding with him?

A. Some time about the middle of March, I think—I am not positive [94] of the dates.

Q. You were corresponding with him in regard to fishing in these waters, weren't you?

A. I was corresponding with him in regard to the Harris lease—I had heard of it and I wanted to get a copy of the lease—I wanted to see what was being done.

Q. You knew about the Harris lease, then, as early as last March?

A. I knew there was a contemplated lease, but I was advised by our representative at Washington that Secretary Redfield had interfered and that no

(Testimony of Charles A. Burekhardt.)

fishing rights would be given to anybody—that everybody would be treated alike in those waters; that there wouldn't be any special fishing privileges.

Q. You knew there was a question about the rights to fish in those waters as early as March, did you?

A. As I told you, I received word that there would be no special fishing privileges given anybody—it was to be left open—that the lease would not carry with it any special fishing privileges.

Q. Now, why did you figure that you would lose 50,000 cases of fish if you didn't operate this trap?

A. I don't know of any other place where I can put a trap—I don't know where to look for any down there.

Q. Supposing you didn't catch enough fish to make 50,000 cases, out of this trap?

A. Out of the two traps.

Q. Then, how much do you expect to lose if you don't operate this one?

A. I estimated 600,000 fish out of that trap, and 200,000 out of the Brendible trap.

Q. How many cases of fish would 600,000 fish make?

A. We figure about 16 fish to a case, right through, on an average.

Q. Now, at your own figures if you didn't catch any fish at all out of this trap, that wouldn't be more than 36,000 cases. [95]

A. And the construction of the trap is \$4,000.00.

Q. I don't care about that.

A. Well, we will lose that.

(Testimony of Charles A. Burckhardt.)

Q. I am not asking you how much you will lose, I am asking you how many cases of fish you would lose if you didn't operate that trap?

A. As I say, I figured 600,000 fish out of that one trap, and 200,000 out of the other trap.

Q. That was an error in your estimate when you told Mr. Hellenthal that you estimated 800,000 fish out of this one trap?

A. Unless I misunderstood Mr. Hellenthal's question—I had no intention to deceive anybody.

Q. Now, how many Chinese do you employ at your Chomley cannery?

A. Well, I would rather answer that as Chinese and Oriental help—we have Chinese and Japs and it is pretty hard for me to figure them separately.

Q. And I suppose some Hawaiians and *Philippinos*?

A. We have sent 55 up there the first part of the season, and 25 more will go about the 1st of July.

Q. And the full crew of the Orientals will be about how many? A. Generally from 70 to 75.

Q. How many men do you employ besides Orientals? A. About 60 or 70.

Q. More? A. Yes.

Q. What do you pay the Chinese and Japs—Orientals? A. 35 cents a case.

Q. How many cases do they put up a day?

A. We figure on putting up from 3,000 to 3,500 cases altogether.

Q. Do you have supply houses from which you furnish your men with goods, etc.? A. Yes.

(Testimony of Charles A. Burckhardt.)

Q. How much average wages does a Chinamen get at the end of the [96] season, for the last 10 years—I mean cash, I don't mean what he has spent in the store with your company?

A. They don't buy much—the Chinese don't buy much in the store. The Chinese contractors, as a rule, make those contracts; I would say a Chinese boy, when he gets out of the cannery there, would have all the way from—the Japs from \$200 to \$300, and the Chinese from \$300 to \$400; the Chinese foremen, we pay them \$100.00 a month and a royalty.

Q. How much do the natives get?

A. The natives are paid by the hour.

Q. How much an hour?

A. The children—little boys and girls who work in the can loft, get 15 cents an hour; then they do other work, such as piling the cans in the coolers, and they get all the way from 25 to 40 cents an hour for that; and then along the line they get 25 cents an hour, 25 to 30 cents in the fish room, and some of them 35 cents an hour, and the Indians who pitch the fish up, they are paid by the thousand—they get 50 cents a thousand. We have two Metlakahtla boys who have been doing that for us for years.

Q. What proportion of native employees are children, girls and kids?

The COURT.—What is the object of all this?

Mr. REAGAN.—I want to get at his damages that he is claiming—I want to find out all about it—he makes the statement that he would lose his labor and I want—

(Testimony of Charles A. Burckhardt.)

The WITNESS.—I haven't included any native help in those items at all.

Q. You included your help—your labor, you said?

A. That is our contract labor and our white help.

Q. You didn't include this in that estimate then?

A. No, that is not in there at all.

Q. Now, what is your net profit on a case? [97]

A. From 50 to 75 cents a case.

Q. I understood you to say you paid out \$500,000 this last winter for your canneries?

A. \$500,000 we have paid out up to the present date.

Q. For how long a period?

A. For this season's operations.

Q. How has that been expended, and for what purpose?

A. For supplies, and materials for making up our pack for this year, advances on labor contracts—we make large advances on our Oriental help.

Q. You will run your canneries just the same if this trap is shut up, won't you?

A. We will run it as far as we can.

Q. You will use every one of these supplies you possibly can?

A. I want to use them all—that is what I bought them for.

Q. Ever run short? A. Of what?

Q. Of supplies? A. No.

Q. Haven't yet at any time since you have been in the cannery business?

(Testimony of Charles A. Burckhardt.)

A. I don't understand what you mean.

Q. Have you at any time, since you have been in the cannery business, run short of supplies so you have had to replenish your supplies—had to buy more before the season closed?

A. Sure, we have these things coming to us all the time, but you understand what I mean—for instance, in the canning business we buy our tin plate, our solder, our labor and all things going to make up the pack itself, is bought in the fall of the year—the box lumber, the nails, and all that material is bought early in the fall of every year, and the contracts with the men who engage the Chinese labor are made early in the fall, and we make advances on these labor [98] contracts, and those are the items I mean.

Q. Did you ever throw out any considerable quantity of these supplies—your boxes, or tin, or solder, or labor, or nails—did you ever throw any of them away, to any considerable extent?

A. We have thrown some cans away; when we haven't made our pack we had cans that became rusty.

Q. To what extent did you throw away cans?

A. We figure on all cans held over in the canneries that there is a depreciation of about 25 cents a case.

Q. But you use the supplies just the same, don't you?

A. If you were to sell them you wouldn't get that much for them; being rusty, they cannot be used for packing food products.

(Testimony of Charles A. Burckhardt.)

Q. Now, the shore around about Cedar Point there is rocky, isn't it? A. Yes, sir.

Q. It has reefs in it that run considerably out in the water, hasn't it? A. Yes, sir.

Q. It is not what you might call exactly a tide flat at all—there is no such thing as a tide flat there, is there? A. Yes, sir; there is a big tide flat.

Q. Whereabouts?

A. Right there at Cedar Point, runs out very shallow a long ways; most of the shores in that Annette Island district are very steep—there are 40 or 50 fathoms of water, and that is the reason these trap locations are so sought after.

Q. What is the deepest water you can drive a trap in?

A. It all depends on how long you get your piles.

Q. I want to know from your experience what is the deepest water you can drive a trap in?

A. We have never driven a trap in over 60 feet of water.

Q. It runs from 60 to 70 feet, doesn't it?

A. About 60 feet is as high as we have ever gone.

[99]

Q. And the lead extends up to shallow water, far enough so that you can get the fish that are coming along the shore? A. Yes, sir.

Q. And at this place it happened to be rocky and you began out below there, didn't you?

A. We didn't begin out below the rocky part.

Q. Now, there is the reef at Cedar Point—it is all

(Testimony of Charles A. Burckhardt.)

rock in here and way down to there (indicating), isn't it?

A. There are rocks scattered all through there; it is not rocky along in here, it is all sand. (Indicating.)

Q. The reason for going down there is because of this reef here, wasn't it? A. No.

Q. You know what that is, don't you? You know that represents that reef that runs out there, don't you? A. That reef doesn't show.

Q. It shows at low water, doesn't it?

A. At extreme low water it shows.

Q. About 175 yards from this point here. (Indicating.)

A. No, the trap starts about here—this is about where the trap comes out—you see he has drawn his line over here too far—the trap comes out here, more like this—it doesn't start there. (Indicating.)

Q. You haven't driven any piles here? (Indicating.) A. No.

Q. The first pile is down here? (Indicating.)

A. Below low-water mark.

Q. That is on account of the condition of affairs—you couldn't use it up here? (Indicating.)

A. That is because we had no right to go up there.

Q. What right did you have to go over there? (Indicating.) A. That is navigable water.

Q. Then, this is all built in the navigable water?

A. Yes, sir. [100]

Q. Did you get any permit from the Secretary of War? A. No.

(Testimony of Charles A. Burekhardt.)

Q. Did you submit any plans to the chief of engineers?

Mr. HELLENTHAL.—Oh, I object to that as immaterial; he said he didn't have any permit.

The COURT.—It is alleged in the complaint and is not denied in the answer.

Q. Right down here it was so rocky you had to suspend the web from this point to that point, didn't you? (Indicating.)

A. We couldn't drive there so we put a wire across to stretch the web down.

Q. From here to here it is good driving, isn't it? (Indicating.)

A. I don't know exactly—it is below low water approximately 65 feet.

Q. Now, you say there is no shipping there at that point? A. No.

Q. Well, then, there is no navigation to be aided, is there?

A. If any one were to go over there it would certainly be a beacon to them to keep away from that reef.

Q. Now, if you don't employ these Metlakahtla natives at your cannery, they will probably seek work some place else, won't they?

A. I suppose they will if they can get work.

Q. There has been no great distress among the Metlakahtlans on account of their not being employed at your cannery, has there?

A. Well, the majority of them are over there now, at Chomley.

(Testimony of Charles A. Burckhardt.)

Q. The Metlakahtlans are doing other work in that part of the country, aren't they—they are running gas boats?

A. Yes, we have bought several gas boats for them, too—six or seven.

Q. They are working at Ketchikan, working in the sawmill there, aren't they? [101]

A. There are very few of them on Annette Island now.

Q. They go wherever they can get work, don't they?

A. Yes, a great many of them go to —— Island.

Q. And if there were industries on the Island that were not interfered with, they would stay on the Island, wouldn't they?

A. I don't know; they don't want to stay on the Island in the summer-time, they want to go off, go away camping—it is more fun for them.

Q. Now, what do you maintain this bell and light for on your trap—is it for the purpose of keeping people from running into the trap?

A. We are compelled by the Department to keep a light on there, and a bell.

Q. Is it for the purpose of protecting the trap?

A. Well, I guess it is for the purpose of protecting the trap and navigation—I don't think it is so much protection to the trap that it is put there as it is protection to navigation.

Q. Is there any regulation of any department of the Government requiring you to put a bell on your trap? A. Yes.

(Testimony of Charles A. Burckhardt.)

Q. Where do you get that?

A. The Department of War.

Q. Will you tell me where I can find a reference to it?

A. No; we have always had a bell and a light on them.

Q. These traps only last one season, you say, and they will have to be redriven next year?

A. Yes, sir.

Q. So when you put this trap in you only expected to run it this season? A. Yes, sir.

Q. And you expected to put in another trap up there next year? A. Yes.

Q. And as many traps around Annette Island as you could get [102] away with?

A. We had no intention of driving another trap there.

Q. You have two traps there?

A. We had two traps there, the Brendible trap and this trap.

Q. The Brendible trap is there now in the name of Brendible, isn't it?

A. Brendible and the Alaska Pacific Fisheries.

Q. The permit is in the name of the Brendible trap, isn't it?

A. We asked for the permit in our own name.

Q. Who did you get the permit from?

A. From the Secretary of the Territory.

Q. That is the only permit you have had?

A. Yes, sir.

Q. Isn't that the ordinary revenue measure on the

(Testimony of Charles A. Burckhardt.)

fish business that the Legislature passed here?

A. I guess it is.

Q. That is all the permission you ever got to construct that trap there? A. All I know about.

Q. Don't you know that Brendible got a permit from the Annette council to build that trap?

A. No.

Q. You never heard anything to the contrary, did you? A. No.

Q. You never heard that mentioned?

A. I stated before that I hadn't; if Brendible had any other permit I know nothing of it.

Q. Now, that cove in there just south of Cedar Point, Cedar Point being situated at its northerly extreme, is called Smugglers Cove, isn't it?

A. Yes.

Q. Now, from headland to headland of that cove, isn't your trap entirely within the cove?

A. No, sir. [103]

Q. Now, that is Cedar Point there, isn't it—that looks about like it to you, don't it? (Indicating.)

A. I don't know anything about whether this map is drawn to scale—it is a Government map—that is all right, that is Annette Island.

Q. It is published at Washington, D. C., by the Coast and Geodetic Survey.

A. That is all right.

Q. Now, from that headland here to that headland here (indicating), isn't that trap entirely within that cove?

A. No, the trap is not in there at all; the survey

(Testimony of Charles A. Burckhardt.)

will show where the trap comes.

Q. Well, I had it surveyed by Mr. Walker about three days ago and that is his survey—would you say that line is 3000 feet from the shore?

A. I don't know—what is the scale there?

Q. I want your opinion on it, as to whether the map is correct or not.

A. The map is absolutely correct as far as that is concerned, but I don't know anything about this (indicating); you can see the rocks around there that I have testified to—it might be 3000 feet—I can tell you exactly if you will give me a rule, I will mark out 3000 feet for you—I don't know whether that is 3000 feet or what it is.

Q. Your trap is within 3000 feet of the shore, isn't it? A. Yes.

Mr. REAGAN.—That's all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Mr. HELLENTHAL.—This map that has been identified as exhibit No. 2, I will offer it in evidence.

The COURT.—It will be received. [104]

(Whereupon said map was received in evidence and marked Defendant's Exhibit No. 2.)

Q. Now, Mr. Burckhardt, can you supply the Chomley cannery with fish from other sources if you are deprived of the privilege of operating the trap at Cedar Point? A. I could not.

Q. They couldn't be procured from other places this season? A. They could not.

(Testimony of Charles A. Burckhardt.)

Q. No way to buy them?

A. Everybody is working to full capacity, every possible location has been taken, the fishermen are all contracted with for their packs, and I couldn't get the gear to put in a trap this season.

Q. Other trap locations in that vicinity have all been taken? A. Yes, sir.

Q. There are none to be had?

A. None to my knowledge. I took that up with Mr. Heckman on my way north, and I asked him if there was any place he could get to drive a trap that would be worth having; and there are none left.

Q. Now, in reference to the location of that trap in regard to the navigable channel of those waters lying along the westerly side of Annette Island—is that trap in a channel that is followed by ships?

A. No, sir; it is not.

Q. Could ships follow along a channel in the vicinity of where the trap is? A. They could not.

Q. It is clear out of the line that any of the larger ships could possibly follow?

A. No ship could possibly travel in there.

Q. That channel lies to the seaward of the trap?

A. Yes, sir.

Mr. HELLENTHAL.—That's all. [105]

Q. (By Mr. REAGAN.) How large a boat could travel in those waters?

A. Oh, a fish boat—a cannery tender—I wouldn't say anything more than that.

(Questions by Mr. HELLENTHAL.)

Q. The fish travel past Smugglers Cove before

(Testimony of Charles A. Burckhardt.)

they reach your trap? A. Yes, sir.

Q. They come from the sea? A. Yes, sir.

Q. Mr. Reagan has been asking you about fish becoming depleted, and you have testified that you have had to go from time to time farther out to seaward to catch your fish? A. Yes, sir.

Q. Because others went ahead of you, is that the reason? A. Yes, sir.

Q. Is that due to the general depletion of the fish supply in the waters of Alaska?

A. It is not; it is simply because they are moving further toward the sea to get their fish.

Q. And one of the reasons is that the fish are better at that point?

A. The fish are better, and since the canneries have adopted the new canning system, the sanitary can, you have to have fresh fish. The old way, if the fish were a little stale you punctured the cans and heated them up to a point where they expelled those gases, but under the new system where the top is crimped on to the can you have to have fresh fish, and that is one reason that desirable trap sites are so much more in demand.

Q. The best way to catch fish is by traps?

A. The most sanitary way is by traps.

Q. And the further seaward you get the better fish you get? [106] A. Yes.

Mr. HELLENTHAL.—That is all.

Recross-examination.

(By Mr. REAGAN.)

Q. And the traps farther in from the sea have

(Testimony of Charles A. Burckhardt.)

been abandoned, haven't they?

A. Some of them have been abandoned.

Q. And that is because they did not fish any more?

A. That is because they didn't get enough fish to pay to put them in—the fish are caught before they get up there.

Mr. REAGAN.—That is all.

WITNESS EXCUSED.

(Whereupon court adjourned until 10 A. M. tomorrow.) [107]

MORNING SESSION.

June 16, 1916, 10 A. M.

CHARLES A. BURCKHARDT, upon being recalled as a witness on behalf of the defendants, having been previously duly sworn, testified as follows:

Direct Examination.

(By Judge HANFORD.)

Q. Mr. Burckhardt, state what was the position of Thomas A. Heckman at the Chomley cannery in the year 1914-15? A. Superintendent.

Q. He was superintendent? A. Yes.

Q. Referring to the arrangement with Brendible for the operation of a fish-trap there on the shore of Annette Island, did the Alaska Pacific Fisheries have any contract in writing with relation to the construction or operation of that trap?

A. Not to my knowledge.

Q. No contract in writing? A. No.

Q. By whom was the contract made under which that trap was constructed and operated?

(Testimony of Charles A. Burekhardt.)

A. By Mr. Brendible and Mr. Heckman.

Q. Did you personally as President or Manager of the Alaska Pacific Fisheries participate at all in the negotiations or consummation of the agreement with Brendible or with the Metlakahtla Indians with relation to that trap?

A. No; the only part I took in that matter was that I approved of the plan that was submitted to me by Mr. Heckman.

Q. You gave your approval to it as it was submitted to you by Mr. Heckman? A. Yes.

Q. Now, as submitted to you did that agreement involve the payment of any fee for a license or permission to operate that trap? [108]

A. Not that I heard of.

Q. Is it possible that there could have been a payment made by Heckman for a license to operate that trap without your knowledge?

A. That is possible.

Q. If any such payment was made you have no knowledge of it?

A. No, I don't know anything of it.

Judge HANFORD.—That is all.

Cross-examination.

(By Mr. REAGAN.)

Q. Mr. Heckman then had some authority in the matter?

A. Oh, yes; Mr. Heckman was superintendent of the cannery under my supervision.

Q. You say you have three canneries, one at Chomley, one at Yes Bay and one at some place else?

(Testimony of Charles A. Burckhardt.)

A. One at Chilkoot.

Q. What is the output of the Chilkoot cannery?

A. 60,000 cases.

Mr. REAGAN.—That's all.

WITNESS EXCUSED. [109]

Testimony of F. O. Burckhardt, for Defendants.

The defendants, to further maintain the issues on their part, introduced as a witness F. O. BURCKHARDT, who, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. Your name is F. O. Burckhardt?

A. Yes, sir.

Q. Do you know the Pacific Alaska Fisheries?

A. Yes, sir.

Q. What is your connection with the Pacific Alaska Fisheries?

A. I am Vice-President of the Company and Superintendent of Chilkoot.

Q. Are you acquainted, in a general way, with the properties of the company? A. Yes, sir.

Q. You are acquainted with the Company's cannery at Yes Bay? A. Yes, sir.

Q. And the Company's cannery at Chomley?

A. Yes, sir, I am.

Q. You are familiar with the business of the company? A. Yes, sir.

Q. With its plans? A. Yes, sir.

(Testimony of F. O. Burckhardt.)

Q. With the work it has been doing in the past few years? A. Yes, sir.

Q. And the things it intends to do?

A. Yes, sir.

Q. Do you know where the Cedar Point trap is located? A. I do.

Q. Do you know when that was located?

A. Cedar Point trap was located during the month of August, 1915.

Q. By locating, Mr. Burckhardt, what do you mean? Explain that [110] to the Court.

A. I mean that during the month of August, 1915, the location was sounded and a diver was sent down to see whether it was possible to drive piles in that location, and it was found possible to drive a trap, so plans were made at that time to put in that trap for the season of 1916.

Q. It was too late to put it in for the year 1915?

A. Practically at the end of the 1915 season.

Q. So that the earliest time the trap could be put in was the next year?

A. As I remember, it was the 20th to the 25th of August, as near as I can recall at this time.

Q. Now, what was done pursuant to that by the company?

A. As far as this particular trap is concerned, or all of our operations?

Q. As far as your operations are concerned so far as they relate to the work done in connection with this trap.

(Testimony of F. O. Burckhardt.)

A. We made our estimate of the number of fish that would probably be caught in this trap in an ordinary season, and made our arrangements accordingly for an increased pack to that extent, bought all the materials in connection therewith and hired all the additional help that was necessary.

Q. Where was this increased pack to be put up?

A. The increased pack was to be put up principally at Chomley.

Q. At the Chomley cannery, and the arrangements you speak of in reference to the employment of additional help and the procuring of additional supplies and the enlargement of the cannery,—the cannery at Chomley was enlarged to some extent, was it not? A. Yes, sir.

Q. The enlargement at Chomley was made by reason of the location of the trap at Cedar Point?

A. Yes, sir. [111]

Q. Do you know what was done in the way of constructing that trap afterwards, or is that a matter of hearsay?

A. It is a matter of hearsay; I was present when orders were given and communications were received, but I did not give any orders personally, and I wasn't there personally at any time when the trap was being driven.

Q. Do you know whether the driving of that trap was in contemplation by the Company at all times between the 25th of August and the time it was completed? A. It was.

(Testimony of F. O. Burckhardt.)

Q. What do you know about that, Mr. Burckhardt?

A. I know we figured on driving that trap after we found it was possible to drive a trap at that location, and all our arrangements were made as soon as we got back to Seattle for the driving of the trap, and we bought all our supplies that would be necessary to take care of the increased amount of fish we would get from that trap, which we would operate, in addition to what we had operated in the year of 1915.

Q. Did you have any knowledge in the month of August, 1915, that there was any contemplated movement on the part of the Government to do anything with the waters surrounding Annette Island—anything unusual? A. No, sir.

Q. Leasing it or reserving it, or anything like that? A. No, sir.

Q. When did you first have any knowledge looking towards the leasing of Annette Island?

A. I think the first knowledge that I had was when I returned to Seattle, late in April, 1916.

Q. Those were the dealings in relation to the leasing of the cannery? A. Yes, sir.

Q. When did you get your first knowledge of the fact that the [112] President intended to or did create a reserve around Annette Island?

A. I think it was somewhere about May 4th.

Q. Prior to May 4th, or thereabout, did you have any knowledge whatsoever that the President ever intended to prevent anyone from fishing the waters

(Testimony of F. O. Burckhardt.)

in which the Cedar Point trap is located?

A. No, sir.

Q. Or that the Department or anyone else intended to take any steps to prevent you from fishing that trap? A. No, sir.

Q. You have been in the fishing business for sometime, Mr. Burckhardt?

A. I have been in the fishing business for seven years.

Q. Do you know how canneries are constructed?

A. Yes, sir.

Q. The length of time required in constructing a cannery? A. Yes, sir.

Q. You know when the fishing season commences and when it closes in the Territory?

A. Yes, sir.

Q. About when does it commence and when does it close? A. The big run?

Q. When does the fishing season first commence?

A. The fishing season in the Ketchikan district starts approximately on the 1st of July.

Q. How long does it continue?

A. It runs until the middle of September.

Q. Now, from what you know as a cannery man and fisherman, can a cannery be constructed on Annette Island,—or could a cannery be constructed anywhere in southeastern Alaska, construction to commence after this date and be completed in time to put up this year's run of fish? [113]

A. Under ordinary conditions it could not, and it

(Testimony of F. O. Burckhardt.)

would be more than impossible now under the extraordinary conditions that prevail this year—in fact it would be absolutely impossible to obtain most of the supplies needed for the operation of a cannery.

Q. Could a cannery be built at all this year and operated this year? A. No, sir.

Q. You are familiar with the trap site at Cedar Point? A. Yes, sir.

Q. Do you know about how many fish that trap ought to catch? A. Yes, sir.

Q. I want you to tell the Court, in your judgment as a cannery man and fisherman, how many fish that trap at Cedar Point, if permitted to fish this year, would catch.

A. Well, in all our estimates last fall we never figured that trap at less than 600,000 fish; as a matter of fact, we considered it one of the best, if not the best, location we had in Alaska for a trap site.

Q. Now, if you are prevented from operating this trap at Cedar Point, would you be able to obtain those fish anywhere else? A. No, sir.

Q. Are there other trap site locations open that are near enough to the Chomley cannery to be of use in connection with that cannery, that you know of?

A. I don't know of any trap sites that are open anywhere that are worth having.

Q. Could those fish be procured in the market?

A. No, sir.

Q. They are not for sale anywhere?

A. No, sir.

Q. Now, to what extent, Mr. Burckhardt, would

(Testimony of F. O. Burckhardt.)

the Pacific Alaska Fisheries be damaged in dollars and cents if they were prevented from operating that trap during the season of 1916? [114]

A. I would say that the damage would be at least \$50,000.

Q. I want you to tell the Court now, upon what you base those figures.

A. Well, we base our figures on the trap at Cedar Point, and the Brendible trap, that they should bring in over 50,000, or at least 50,000 cases of fish, on which our profit should be 50 cents a case, which would be \$25,000; the Cedar Point trap is in, and if we are not allowed to operate it we would lose what it cost us, and that cost about \$4,000 to \$5,000 to construct.

Q. Let me interrupt you a minute—if the trap is not operated this year, would you be able to use it next year? A. No, sir.

Q. It will go out during the season?

A. It will go out; some of the web can be used, but outside of the web that can be used I would say our damage would be in the neighborhood of \$4,000 to \$5,000.

Q. To that trap itself?

A. Yes. We will have these 50,000 cases of cans left over, and I have carried over cans in Chilkoot a number of times since I have been there and the damage on the cans has run all the way from 10 to 50 per cent—cans in the winter-time, the change in the atmospheric conditions will cause them to rust,

(Testimony of F. O. Burckhardt.)

and no matter how carefully you pack them away you cannot get away from it. I would say the damage to these cans would be at least 25 cents a case, which would be \$12,500.

Q. What damage, if any, would you sustain as to the labor you have contracted for?

A. We have contracted for our Chinese labor at both of these canneries at so much per case, and this labor must be paid for whether the pack is put up or not, and if we should have 50,000 cases left over it would cost us 35 cents a case, less the price of 4 cents, which goes on to the making of [115] the cans, and 1 cent is for making the box, so what we would be out would be the difference between the 35 cents and 4 cents and 1 cent, or 30 cents a case, which would be \$15,000 for labor for which we would get no return.

Q. Be an absolute loss to you?

A. Absolute loss; then there would be other loss, interest on our investment, our insurance, in addition to this amount,—it would easily be \$50,000, if not more.

Mr. HELLENTHAL.—You may cross-examine.

Cross-examination.

(By Mr. REAGAN.)

Q. Did you ever have a trap at Cedar Point before, Mr. Burckhardt? A. No, sir.

Q. Ever catch any fish there? A. No, sir.

Q. On what do you base your estimate of the number of fish the fish-trap would catch, then?

(Testimony of F. O. Burckhardt.)

A. We base our estimate on the way the fish run in there, and the location of the trap, taking into consideration the way fish travel—the fish coming in, pass up that shore and the majority of them pass close to Cedar Point, and in my opinion the trap at Cedar Point is the best trap in that district.

Q. You mean the best constructed or the best location?

A. It is the best location for a fish-trap in that district.

Q. And you have never had a trap there before?

A. No, sir.

Q. You have never caught any fish there before?

A. No.

Q. Then that is simply a guess as to how many fish you would catch there, isn't it?

A. No, it would not be a guess at all; when you know how fish [116] run, how they travel, where they travel, how the tide sets, you can form an estimate of what you will get out of a certain trap in an ordinary season.

Q. When did you first commence to observe the fish at Cedar Point?

A. When did I first commence to observe them? Oh, I have known there were fish running in there since—the first time I ever observed any fish running in there was in 1914.

Q. About what time in the year did you observe them there?

A. Well, I couldn't tell you; it was during the fishing season, but I couldn't tell you the month.

(Testimony of F. O. Burckhardt.)

Q. How long were you there at that time?

A. I made two different trips there.

Q. The first trip.

A. Well, I wasn't there very long; I was there during one tide, and the next time I was there during one tide, the flood tide, that is when the fish were running.

Q. You stayed in your boat? A. Yes.

Q. Did you anchor the boat? A. Yes.

Q. Or did you tie it up somewhere?

A. No, we drifted there.

Q. When was the next time after 1914 that you went there?

A. I haven't been there since 1914.

Q. And you were only there during two tides, in 1914? A. Yes.

Q. Now, from the observations you made at those two tides two years ago you estimate you can catch 600,000 fish in this trap?

A. Yes—together with information I have received from there.

Q. What other information did you get?

A. Well, it is hearsay—I don't know whether you want it in [117] this or not.

Q. I want to know who told you?

A. It is from information I have gotten from conversations I have had with my brother.

Q. And Tom Heckman?

A. And Mr. Heckman and with Mr. J. R. Heckman, and Mr. George Rounsfall.

(Testimony of F. O. Burekhardt.)

Q. Now, you say you made soundings there in August of last year—who had charge of those soundings?

A. I will tell you where my information came from.

Q. No, if you know who had charge of those soundings, just answer that.

A. I will answer it as I can answer it.

Q. No, if you don't know, don't tell me; if you do know, tell me. A. I was at Ketchikan—

Q. No, answer that question.

A. Well, I am answering it.

Q. I want you to answer that question, if you know who had charge of those soundings.

A. I don't know absolutely.

Q. You don't know personally? A. No, sir.

Q. Who has charge of your soundings, generally, if you know? A. Where?

Q. Anywhere where you choose to sound for trap sites?

A. Well, I have had charge of them at times and Mr. Heckman has had charge of soundings at times.

Q. He is generally the one who had charge of them, or has had for the last two years, isn't he?

A. Not in my district he is not.

Q. Do you know anything about this district of your own knowledge? [118]

A. In a general way.

Q. Then, you don't know who had charge of the soundings—

(Testimony of F. O. Burckhardt.)

A. I know the diver has been out with my brother and he has been out with Mr. Heckman.

Q. Mr. Heckman has charge of this particular trap site, hasn't he?

A. I don't know what you mean by having charge.

Q. Well, he has supervision over it—he is superintendent, isn't he?

A. He was superintendent of the construction of that trap, yes.

Q. And naturally you would think he knew something about the soundings there if he was superintending the construction, wouldn't you?

A. I think he knew all about the soundings—no question about that.

Q. Do you know whether or not Mr. Heckman made more than one sounding operation there?

A. Whether the diver went down at more than the trap I have referred to?

Q. More than one trip when you made the soundings for this trap.

A. I don't know whether he had been out there at any other time or not.

Q. Is it customary or usual for your company to make soundings twice in the same location?

A. I have done that, yes; it is not customary; something may turn up that would make it necessary to send the diver down again.

Q. Well, if Mr. Heckman knew the conditions there from having made soundings, he would not likely make them over again, would he?

A. He might; he might want to find out if it was

(Testimony of F. O. Burekhardt.)

possible to run his lead in a different direction, or whether it was possible to run his trap out farther than his soundings took him. [119]

Q. Well, if he had made soundings at any time that satisfied him that it was a possible trap site, would he, under those conditions, make additional soundings?

A. I don't know why he would if he was satisfied everything was all right.

Q. Now, you know that the waters where this trap is located and where your other traps are located are waters of the United States, don't you?

A. They belong to the United States.

Q. And you know there is an inhibition in the law against the placing of any structure in the waters of the United States without permission from the War Department, don't you?

A. I don't know that.

Q. You don't know that?

A. No, I don't.

Q. Don't you know it now?

A. No, I don't know it now.

Q. You don't know that is the law?

A. No, sir.

Q. You never got any permission from the War Department for the construction of any of your traps, did you? A. Yes, sir; we did.

Q. Why did you do that?

Mr. HELLENTHAL.—We object to that—this man is not passing a law examination.

(Testimony of F. O. Burckhardt.)

The COURT.—Objection sustained.

Q. Now, do you suppose if there were any fish caught—you are a cannery man and know the condition of the fish market for canning purposes around Ketchikan and in that neighborhood?

A. Yes, sir.

Q. Do you know whether there would be a market for fish caught off Cedar Point, if you didn't catch them?

A. Surely there would be a market for them.
[120]

Q. So if the natives went out and caught these fish they could sell them, couldn't they?

A. How are they going out to catch them?

Q. Answer my question.

A. If it was possible for them to catch them they could sell them.

Q. They would have a market for all of the fish they caught off Cedar Point, wouldn't they?

A. Yes, sir.

Q. And the market is such now that it is hard for you to buy enough fish? A. Yes.

Q. When your company put in that trap they knew it wouldn't be fit for service next year, didn't they?

A. Why, yes—as I said before, we figured that the piling would be gone, but part of the web could be used next year—how much of the web I don't know.

Q. Did you know that your brother had had any correspondence with the Secretary of the Interior

(Testimony of F. O. Burckhardt.)

this spring? A. I did not.

Q. Didn't know anything about that?

A. No; I left there very early.

Q. About how early?

A. I left Seattle, I think it was about the 24th of March, or even earlier than that, I think it was.

Q. Now, when you contract for your labor you have to pay your labor bills whether you catch the fish or whether you don't; is that it?

A. We pay our labor bills, yes.

Q. As a matter of business and as a matter of law you pay your labor for what you contract for?

A. Certainly.

Q. And when you contract your labor you estimate the labor you will require? [121]

A. We estimate the labor we will require on our estimated pack.

Q. And if you fall short of your pack you lose on that labor? A. Certainly.

Q. And if you exceed your estimated pack you are a little ahead, aren't you?

A. Yes, we are a little ahead.

Mr. REAGAN.—That's all.

(Questions by The COURT.)

Q. Mr. Burckhardt, I understood you to say in the Ketchikan district the fish begin to run about July 1st?

A. Well, they run before that, but there isn't much of a run; ordinarily we figure it about the 4th of July; there are fish running in there now, but not of any consequence.

(Testimony of F. O. Burekhardt.)

Q. Neither trap, then—neither the Brendible trap nor this trap at Cedar Point is fishing now?

A. No.

Q. And won't be fishing until about the 1st of July?

A. Well, if we were allowed to operate the Cedar Point trap it would be getting some fish now—when I said the 1st of July I meant fish of any consequence.

Q. That is when the run begins?

A. That is when the run begins.

Q. And the fish which come in between this time and the 1st of July are simply advance scouts, you might say—runners?

A. Yes, advance guards. Now, as far as the Brendible trap goes, we haven't put the Brendible trap in. The Cedar Point trap at this time would be getting some fish—I don't know how many, but it would be getting some fish.

Q. The Brendible trap is not in operation this year?

A. No, sir; we haven't put it in; we have another trap up above there, on Gravina Island, that last week caught, I think it was 300 fish, and if you take all of your traps and get 300 fish out of them you would get a day's run now and then. [122]

The COURT.—That's all.

Redirect Examination.

(By Mr. HELLENTHAL.)

Q. The construction of the Brendible trap had not

(Testimony of F. O. Burckhardt.)

yet commenced before these proceedings to enjoin you were instituted? A. No, sir.

Q. You were unable to construct the trap on that account, because you were enjoined from constructing traps on that Island generally and you just left the thing alone? A. Yes, sir.

Mr. HELLENTHAL.—That's all.

Recross-examination.

(By Mr. REAGAN.)

Q. And you say it is too late now to build a cannery? A. Yes, sir.

Q. Or to build a trap? A. No.

Mr. REAGAN.—That's all.

(Witness excused.) [123]

The defendants, to further maintain the issues on their part, read in evidence the affidavit of Joe Jenkins, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
Division No. 1, at Ketchikan.*

No. 263-KA.

No. 1468-A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of Joe Jenkins.

United States of America,
Territory of Alaska,—ss.

Joe Jenkins, being first duly sworn, on his oath deposes and says: I am trapman for Alaska Pacific Fisheries, a corporation, defendants herein, and have been in the employ of said corporation as trapman at all the times hereinafter mentioned; that on the 7th day of April, 1916, I went to the trap site known as Cedar Point, with a tow of piles, which said site is situate in a westerly direction from the town of Metlakatla and in deep water off the westerly shore of said island, and about 2,000 feet from extreme low-water mark, and on the said date, to wit, the 7th day of April, 1916, I commenced driving a fish-trap on said trap site and continued driving the same until it was completed on the 18th day of April, 1916. That all of the lead to said trap is driven in deep water and no part thereof is nearer than about 400 feet of extreme low tide and that no part of said lead is less than about 1,000 feet in distance from the shore line of Annette Island or the shore line of any land whatsoever.

JOE JENKINS. [124]

Subscribed and sworn to before me this ninth day of June, 1916.

JAMES M. SHOUP,
Notary Public in and for the Territory of Alaska.
My commission expires June 20, 1919.

Due service by copy admitted this 15th day of June, 1916.

JOHN J. REAGAN,
Attorney for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Jun. 5, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy.

The defendants, to further maintain the issues on their part, read in evidence the affidavit of Ernie Copeland, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
Division No. 1, at Ketchikan.*

No. 263-KA.

No. 1468-A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of Ernie Copeland.

United States of America,
Territory of Alaska,—ss.

Ernie Copeland, being first duly sworn, on his oath deposes and says: I am now the captain of the "Wm. T. Muir," which said boat is the property of the defendant corporation herein, that I am now captain of said boat and employed as such by the said de-

fendant corporation, and have been captain of said boat, and employed as aforesaid, at all times herein-after mentioned; that heretofore, to wit, on the 7th day of April, 1916, I left the Chomley Cannery, the property of the said defendant corporation, with said boat having in tow a pile driver and a tow of piles, having on board of said boat the trapman together with a trap-driving [125] crew on said pile-driver; that I arrived at Cedar Point off the westerly shore of Annette Islands at the trap site known as Cedar Point, distant about four miles from the Town of Metlakatla and I remained at said trap site, with said boat the "Wm. T. Muir" and the said pile-driver, until a fish-trap was driven on said trap site; on the completion of said trap, on the 18th day of April, 1916, I towed said pile-driver from said trap site, the trapman and trap-driving crew leaving at the same time on board the said pile-driver:

That I have read over the affidavit of Joe Jenkins, subscribed and sworn to on this 9th day of June, 1916, regarding the location of said Cedar Point trap site and the distance that said trap and the lead thereto are from the shore line of Annette Island, and from my observations while said trap was being driven, at the time aforesaid, believe that the statements contained in said affidavit are true.

ERNIE COPELAND.

Subscribed and sworn to before me this 9th day of June, 1916.

JAMES M. SHOUP,
Notary Public in and for the Territory of Alaska.
My commission expires June 20th, 1919.

Service by copy admitted this 15th day of June, 1916.

JOHN J. REAGAN,

Asst. U. S. Atty.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

Whereupon the DEFENDANTS RESTED.
[126]

REBUTTAL.

The plaintiff, to further maintain the issues on its part, in rebuttal, read in evidence the affidavit of John J. Reagan, which was in words and figures as follows, to wit:

*In the District Court for the District of Alaska,
First Division, at Ketchikan.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES etc. et al.,

Defendants.

Affidavit of John J. Reagan.

United States of America,

Territory of Alaska, Juneau,—ss.

Jno. J. Reagan, being duly sworn, deposes and says: That the attached paper is a telegraphic copy of an affidavit executed by Charles Brendible on June 14th, 1916, at an hour too late to permit of its being forwarded by mail, therefore, upon request of

affiant same was telegraphed so that it may be used in the hearing of the show cause order herein.

JNO. J. REAGAN.

Subscribed and sworn to before me this 15th of June, 1916.

[Seal]

INA S. LIEBHARDT,
Notary Public for Alaska.

My commission expires September 29, 1919.

[Title of court and cause.]

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES etc.,

Defendants.

Affidavit of Charles Brendible.

Chas. Brendible, being first duly sworn, upon oath deposes [127] and says that he is resident and inhabitant of Annette Islands Reserve, Alaska, that he is not in any manner interested or a party with the Alaska Pacific Fisheries Co., in the erection and maintaining of a fish-trap near Cedar Point, Annette Island, Alaska, that he has never at any time entered into any agreement with the aforesaid Company whereby it was to erect the said trap at the said location or at any other location at Annette Island, Alaska, that he is in no manner interested in the said trap and so far as he knows the said trap was built by the said company independent of any resident and inhabitant of the Annette Islands Reserve or Metlakatlan. Affiant further says that dur-

ing the month of May, 1915 A. D. he employed Mr. Tom Heckman, manager of the above-mentioned company to survey a trap site at the said point and talked with the said manager in regard to erecting a trap at the said site for the year 1916 A. D., but that he did not enter into any agreement with the said manager or any other officer or representative of the said company whereby the said company was to build the said trap; affiant further says that he is not possessed of any permit from the council of the Annette Islands Reserve to erect a fish-trap at the said location and has never represented to the defendant company that he had a permit for the erection of a trap at the said location and has never assigned or attempted to assign any such permit to the said defendant company.

(Signed) CHAS. BRENDIBLE.

Subscribed and sworn to before me this 14th day of June, 1916.

[Seal]

D. NOLL,

Notary Public for Alaska.

Filed in the District Court, District of Alaska, First Division. June 16, 1916. J. W. Bell, Clerk.
By C. Z. Denny, Deputy.

The plaintiff to further maintain the issues on its part, in rebuttal, read in evidence the affidavit of John J. Reagan, which was in words and figures as follows, to wit: [128]

*In the District Court for the District of Alaska,
District No. One, at Ketchikan.*

No. 263-KA.

No. 1468-A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Affidavit of John J. Reagan.

Territory of Alaska,
Juneau Precinct,—ss.

Jno. J. Reagan, being duly sworn, on oath deposes and says: that he is Assistant United States Attorney for the First Division of the District of Alaska, representing the plaintiff at this hearing; that the plaintiff herein has at all times since the making of said reserve had control and supervision of said reserve and of the operations thereon of the said inhabitants thereof and of one William Duncan mentioned in defendant's answer as Father Duncan, and that at all times said Duncan was present on said island only with the consent of the plaintiff; that the plaintiff annually appropriated sums of money for many years for the use and benefit of said Metlakahtlans and the same was expended by permission of the plaintiff for the use of said Metlakahtlans by

the said William Duncan; that said sums amount in the aggregate to upwards of \$15,000; that said William Duncan has at all times been amenable to the laws of the United States and to the supervision of the plaintiff; that all moneys devoted to the industrial, moral and educational concerns of said reserve and the inhabitants thereof were furnished either by the plaintiff or by philanthropic people and were furnished to said Duncan in trust for the uses and benefits of said inhabitants of said reserve and that out of said sums donated by said philanthropic persons and the sums appropriated by the plaintiff the inhabitants of said reserve were brought to a fair state of industry and civilization; [129] and that said Duncan by reason of differences with the plaintiff as to continuing the advancement of the inhabitants of said reserve along the lines indicated in this affidavit, was superseded by the Bureau of Education of the plaintiff wholly for the benefit of the inhabitants of said reserve and that whatever disloyalty there may be to the plaintiff on the part of a few of the inhabitants of said reserve is due solely to the influence and persuasion of said William Duncan. The defendant well knows and knew at and prior to the time it began the construction of said trap and intrusion in said waters that the plaintiff, as part of its administration of said reserve, never permitted any trap to be driven within the waters surrounding said reservation and through its Department of the Interior for the first time since the creation of said reserve granted a permit to a

Metlakahtlan to drive a trap in said waters and that subsequently it, said Department, created the Annette Council with authority to grant permits to build traps in said waters to the persons lawfully inhabiting said reserve, to wit, said Metlakahtlans; and defendant also knew prior to its intrusion in said waters and the construction of said trap that such permits were required from said Council or said Interior Department before any trap could be driven in said waters, and also knew prior to its intrusion in said waters and prior to the construction of said trap that such permits were granted only to the Metlakahtlans and other Indians residing on said reserve, and that others were not permitted under the regulations of the Secretary of the Interior to construct or maintain traps in said waters. And defendant knew prior to its intrusion in said waters and prior to the construction of said trap that the fish caught in said waters were disposed of wholly for the benefit of said Metlakahtlans and other natives inhabiting said reserve, and knew that it was a trespasser in said waters in entering therein and constructing said trap. And defendant also knew that heretofore it has obtained its supply of fish so far as the same are derived from said waters, by purchasing [130] the same from the Metlakahtlans who caught them, and that it can still do so.

JNO. J. REAGAN,

Asst. U. S. Atty.

Subscribed and sworn to before me this 15th day of June, 1916.

[Seal]

INA S. LIEBHARDT,

Notary Public.

My commission expires September 29, 1916.

Rec'd a copy of above June 15, 1916.

HELLENTHAL & HELLENTHAL.

Filed in the District Court, District of Alaska, First Division. Jun. 15, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy.

Testimony of John J. Reagan, for Defendants.

Thereupon, upon the request of the defendants, JOHN J. REAGAN was called to the stand and testified in answer to questions as follows:

Cross-examination.

(By Judge HANFORD.)

Q. Mr. Reagan, how long have you been residing in Alaska? A. About 14 years.

Q. Are you personally acquainted with William Duncan? A. Yes, sir.

Q. Have you become, in any way, personally familiar with the operations of the colony on Annette Island since it has been inhabited by the Metlakatlans? A. Yes, sir, officially.

Q. To what extent—in what way? Just explain to the Court what your actions have been that gave you personal knowledge of the matters you have sworn to in this affidavit.

A. Ever since I have been in the United States Attorney's office, first acting as United States At-

(Testimony of John J. Reagan.)

torney, and latterly as Assistant United States Attorney, the affairs of the Metlakahla Indians have been under the supervision of the Department of [131] Justice, and under my supervision for nearly a year, and as Assistant United States Attorney all of these matters have been thrashed over in my office and in court and before the grand jury, and all of the statements that I have made here are statements made by Mr. Duncan himself, under oath, in the grand jury-room at Ketchikan.

Q. You are making a public revelation, now, are you, of testimony given in the grand jury room?

A. I am not; Mr. Duncan has also made those same statements to me in the office of the United States Attorney at Ketchikan, not once but many times.

Q. You state in this affidavit that Duncan's presence on the Island was with the consent of the plaintiff—where did you get that information?

A. From himself.

Q. From himself?

A. Yes, sir; he told me how he first happened to go there, and how he happened to get the place set aside as a reservation, and he told me where he came from, and his—

Q. I am asking now specifically about this consent of the plaintiff—was that by an Act of Congress, or by what authority was that consent given?

A. He got his consent legally, I suppose you would call it, by procuring an Act of Congress setting aside the reserve.

(Testimony of John J. Reagan.)

Q. Does that Act of Congress mention Father Duncan as being the only one permitted to occupy the island? A. It does not.

Q. Is there any other Act of Congress that specifically gives him permission to occupy that island?

A. To occupy the island with his natives—he brought them there and had charge of them.

Q. Now, isn't that just an inference of your own that that is included in this permission of the Metlakahtlans because he has been with them? [132]

A. It is not; I have had conversations with him and correspondence with the Department.

Q. In what way, and what correspondence have you got to base this statement on that the United States ever gave permission to William Duncan to occupy Annette Island?

A. There is considerable correspondence in the office.

Q. Is that as near as you can come to answering my question? A. Yes, that is about as near.

Q. Now, what knowledge have you with regard to the appropriation of sums of money for many years past for the use and benefit of the Metlakahtlans?

A. Statutes of the United States and Duncan's statements.

Q. Can you give reference to the statutes making those statements?

A. I cannot; I tried to find them yesterday, but I have seen them many times; and also Duncan's statements to me.

(Testimony of John J. Reagan.)

Q. What knowledge have you with respect to the sums of money being expended by permission of the plaintiff for the use of Metlakahtlans?

A. Mr. Duncan's own statements.

Q. Then you have only hearsay testimony to offer this Court as to the expenditure of money?

A. Well, I could have gotten more testimony if I had subpoenaed his books, but I didn't want to quarrel with him—but he admitted that to me.

Q. I wish you would give the definition of what you regard as "the expenditure of moneys devoted to the industrial, moral and educational concerns of said reserve"—what expenditure was there for industrial concerns?

A. I cannot segregate it, sir.

Q. Cannot segregate it?

A. No, no one but Mr. Duncan can do that.

Q. No one but Father Duncan can do that?

A. No; Mr. Duncan does not want to be called Father Duncan—he told me not to do that. [133]

Q. Isn't he generally known as Father Duncan?

A. Yes, they call him that but he objects to it.

Q. I don't want to offend him; I use it because I got in the habit of using it when speaking of him. What knowledge have you with respect to money being contributed by philanthropic persons and furnished to Father Duncan in trust for the use and benefit of the inhabitants?

A. Statements of Father Duncan.

Q. All his statements—do you know where the money came from that paid for the construction of

(Testimony of John J. Reagan.)

the salmon cannery that was on Annette Island that has been destroyed by fire?

A. Contributions made to Father Duncan, for the benefit of Metlakahtlan natives—especially one sum of something like \$11,000 contributed by a Boston gentleman, whose name I don't recall, which was afterward returned to him out of the proceeds of the cannery.

Q. Have you any knowledge on that subject other than what you have obtained from hearsay, or information from Duncan himself? A. That's all.

Q. In regard to the sawmill on Annette Island and the water works and all the improvements that are there, is your knowledge with respect to the source of capital by which those things were provided derived in the same way, from statements of Duncan?

A. No, some of my knowledge comes from Statutes of the United States, some from official correspondence with the Interior Department, and some from correspondence from the Department of Justice.

Q. Was there ever any specific appropriation by Congress of money for a sawmill or water works, or any of these improvements?

A. No, sir; not that I know of.

Q. Do you know who superintended the construction of the cannery and the sawmill and the church and the other improvements [134] they have there? A. No, sir.

Q. You wouldn't state who superintended the construction of them? A. No, sir.

Q. You know the history of the Metlakatla tribe

(Testimony of John J. Reagan.)

and their emigration to Annette Island, do you?

A. Very meagerly from Duncan's statements.

Q. How long had the Metlakahtlans been occupying Annette Island before Congress took any action recognizing their right to be there?

A. Two or three years.

Q. Was that before or after you came to Alaska?

A. That was before.

Q. And your knowledge on that subject is such as you have obtained in a general way?

A. Historically.

Q. Has there been any written or public history covering that point?

A. Well, I believe there is but I haven't read it.

Q. Couldn't refer to any written history?

A. Somebody has written a book that Duncan didn't like, and other people have written about it, but I didn't pay any attention to it.

Q. In this affidavit that you read to the Court, the affidavit of yourself, you make statements in regard to the knowledge of these defendants with respect to what was done and contemplated about these fisheries—upon what do you base your authority for making the statements as to the defendants' knowledge on these subjects?

A. Statements made by Mr. Heckman, who is their foreman, or some such officer of the company.

Q. Have you had personal interviews with Mr. Heckman on these subjects? [135]

A. I have not; I have the sworn statements of others.

(Testimony of John J. Reagan.)

Q. Is that in evidence?

A. Some of it is; there are some affidavits there in which it is related.

Q. Then all that is involved in this affidavit of yours is simply an enlargement on affidavits made by somebody else that are already in the case?

A. Oh, no, by no means.

Q. You make this statement in your affidavit, "The defendant well knows and knew at and prior to the time it began the construction of said trap and intrusion in said waters that the plaintiff as part of its administration of said reserve never permitted any trap to be driven within the waters surrounding said reservation and through its Department of the Interior for the first time since the creation of said reserve granted a permit to a Metlakahtlan to drive a trap in said waters"—you state this as a positive fact, that the defendants knew that—now, how do you get the information as to the knowledge of the defendant on that subject?

A. The knowledge of their superintendent is their knowledge—he knew all about it.

Q. Their superintendent is who?

A. Mr. Heckman.

Q. Did Mr. Heckman communicate personally to you that he had any such knowledge? A. No.

Q. You state this on the authority of Mr. Heckman because somebody else has made an affidavit that Heckman had such knowledge?

A. Partially, and partially because Mr. Heckman lives there and knows the condition of every cannery

(Testimony of John J. Reagan.)

man down there, and knows the condition of your clients, and your clients know the conditions, too.
[136]

Q. That is a pretty broad statement—you pretend now to tell this Court what every person in that vicinity knew—have you circulated among those people to such an extent that you know what they knew? A. I know they knew it.

Q. You sit there in that chair under oath and tell this Court that they do know it?

A. Yes, sir, I do just exactly that.

Q. You say in this affidavit, “And defendant knew prior to its intrusion in said waters and prior to the construction of said trap that the fish caught in said waters were disposed of wholly for the benefit of said Metlakahtlans and other natives inhabiting said reserve and knew that it was a trespasser in said waters in entering therein and constructing said trap.”

A. Yes, sir; Mr. Burckhardt himself has so stated; he had an arrangement with Brendible last year and he knew what that arrangement was, and he knew he couldn't drive a trap there without a permit from the Annette Council given to Metlakahtlans, and he also knows that the Metlakahtlans had to pay out of the proceeds of the trap for the work done on it.

Q. You mean to make a direct contradiction of Mr. Burckhardt's testimony when he said he had no such knowledge?

A. His company had—maybe he personally didn't have it.

Q. His company had? A. Yes, sir.

(Testimony of John J. Reagan.)

Q. Can a corporation have any knowledge of facts or law except through the intelligence of its officers?

A. A corporation is bound to know the law the same as any other person.

Q. You assume then that this is knowledge that was imputed to the corporation by the law itself—that implies that there *there* is some law on the subject; can you cite this Court [137] to any law that prohibits fish-traps in the waters surrounding Annette Island except by permission of the Secretary of the Interior? A. Yes, sir.

Q. State the law, please.

A. The law creating the reserve, Act of March 3, 1891.

Q. I have here and show you a paper purporting to be a copy of the President's message and in which the only law on the subject that I know of is quoted—I wish you would look at that and see if that is a correct quotation of the law you are now citing to the Court. A. That is the one I refer to.

Q. Do you know of any other law which prohibits fish-traps in the waters surrounding Annette Island excepting this particular Act of Congress?

A. Yes, sir.

Q. This is all? A. Why, I know more.

Q. Is there any word or phrase in that law that is prohibitive of the exercise of the right of fishing in those waters? A. Yes, sir.

Q. Read it to the Court.

A. "Said Islands be, and the same are, hereby set

(Testimony of John J. Reagan.)

apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior."

Judge HANFORD.—That is all.

Whereupon the PLAINTIFF RESTED. [138]

SURREBUTTAL.

Testimony of C. H. Hanford, for Defendants (In Surrebuttal).

Whereupon the defendants, to further maintain the issues on their part, in surrebuttal, introduced as a witness C. H. HANFORD, who, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified in answer to questions as follows:

Direct Examination.

(By Mr. HELLENTHAL.)

Q. You may state your name, please.

A. Cornelius H. Hanford.

Q. Where do you reside? A. Seattle.

Q. How long have you resided there?

A. Well, since I first commenced to live in Seattle it is a matter of about 61 years.

Q. Do you know Father Duncan?

A. I have met him, yes.

Q. How long have you known Father Duncan?

(Testimony of C. H. Hanford.)

A. Personally not over ten years.

Q. What was the first time that you visited the colony in charge of Father Duncan?

A. I first visited the Metlakahtla colony when it was located in British Columbia, village of Metlakahtla, and about all I can tell in this matter, if you will allow me to give it in a narrative I can give it very shortly.

Q. All right, proceed that way.

A. In the month of August, 1887, I was a passenger on the steamship "Olympian," making the trip from Seattle to Lynn Canal, Sitka and other places. There was quite a large list of passengers making the summer excursion to visit Alaska at that time, and there was included in that list of passengers [139] Senator West, Senator Farwell and Senator Don Cameron—Senator West was from Missouri, Senator Farwell was from the state of Illinois, and Senator Cameron was from the state of Pennsylvania; there were other prominent public-spirited citizens of the United States making the trip—Colonel Elliott F. Shepard, publisher and editor of a newspaper in New York, and several members of the faculty of Harvard University and others whom I cannot recall to name them, but it was a company composed largely of distinguished American citizens. On the journey northward the passengers were joined by the Reverend Sheldon Jackson—I don't remember at what point he came on, but he made the remainder of the journey northward and returned with us. He was at that time actively engaged in educa-

(Testimony of C. H. Hanford.)

tional work among the Indians of Alaska, and became a source of information to the passengers on the boat, telling them all about Alaskan natives and so on, and he gave certain information about the Metlakahtla Indians, that became a subject of interest among all the passengers on the boat, especially these senators and prominent citizens. His information was generally to the effect that the Metlakahtla Indians were a remarkable people in themselves—that they had been formerly cannibals; that they had been converted to Christianity through the ministrations of Father Duncan—I cannot avoid calling him Father Duncan because that is the way we generally have known him—that they had become converted to Christianity and discontinued their savage practices, especially cannibalism and had made wonderful progress in becoming civilized and acquiring skill in mechanical arts, and along educational lines, and in their adoption of civilized habits; that these Indians were at that time in a state of revolt against the authorities of the Church of England, which had assumed jurisdiction over that village, by reason of a disagreement between Father Duncan and the Bishop as to certain rites in the ceremonies of the church [140] and the doctrines of the church, and because of this disagreement the Bishop had deposed Father Duncan from his position as being manager in charge of that village; that the Indians were in a state of revolt against the Bishop because Father Duncan had been deposed and they would not accept the dogmas and ceremonies that

(Testimony of C. H. Hanford.)

the Bishop insisted to be observed in their religious worship. On account of that information being given by Dr. Sheldon Jackson, the passengers became so much interested in the subject that they persuaded the Captain to call at Metlakahtla on the return of the steamer. We landed there and met some of the Indians, and most of the passengers spent all the time we had there in conversing with them and getting all the information we could from them in regard to their affairs. The story told by Sheldon Jackson was confirmed by the Indians as to their disagreement with the Bishop and their being in sympathy with Duncan. I didn't see Duncan at that time, and my recollection is that he was not present, but the new manager who had been placed in charge by the Bishop was there and different ones of the passengers conversed with him.

The passengers, and especially Colonel Shepard and the Senators, were very much surprised by the appearance of civilization and thrift among those Indians—we saw their houses that they lived in; they were neat cottages; the women and the children were well dressed, the houses were well kept and clean; they had substantial furniture; they had good cooking utensils; they had good beds with nice clean linen, and everything being so civilized attracted us because it was different from what we had observed among other Indians in this locality. We were shown the sawmill that they operated; we were shown a very commodious church that we were told had been built by the Indians by their own hands from lumber

(Testimony of C. H. Hanford.)

which they had manufactured in their own sawmill, and that the sawmill was also constructed by them. They had a pipe organ in that church, and we were told the ceremonies [141] were conducted by the Indians in the English language, that they were proficient in music and took great pleasure in the ceremonies of worship according to the same style that the white people do. They appeared to be capable, thrifty, well-to-do people, able to make their own way in the world just like other people, and as far as we had any knowledge on the subject they had developed entirely under the teaching and direction and management of Duncan.

Q. This was in British Columbia where they were located at that time?

A. Yes, this was in British Columbia.

Q. Prior to the time that they emigrated to Annette Island?

A. That was prior to the time that they emigrated to Annette Island, and I heard some conversation between some of the passengers—and I think Colonel Elliott was especially concerned—and the Indians and that conversation was that the Indians, rather than submit to the exactions of the Bishop, would leave there—they would abandon all these improvements they had made there and leave there if they could find a place to go to. Whether there was any specific information or welcome they would receive if they moved over on to American country I don't remember, but the feeling was that they would not submit to the Bishop and they would move away.

(Testimony of C. H. Hanford.)

Q. And this led to their moving to Annette Island?

A. That is inferential, I cannot say it is a fact.

Q. And it was after this that the Act was passed setting aside Annette Island?

A. The Act was passed in 1891; they had moved there two or three years before they passed the Act.

Q. Do you know who was in charge of the colony when they moved?

A. Only as it is a matter of general knowledge I know Father Duncan has been the head man in connection with the colony until recently. [142]

Q. From the earliest time on? A. Yes.

Mr. HELLENTHAL.—That is all.

Mr. REAGAN.—No questions.

WITNESS EXCUSED.

Whereupon the DEFENDANTS RESTED.

And both sides having submitted all of their evidence and having rested their case, it was agreed in open court by counsel for the respective parties, that all the foregoing affidavits and testimony heard upon this hearing might be considered by the Court as evidence upon the trial of the cause and that the cause be considered on the merits and be adjudged by the Court as upon the final trial, it being agreed by both parties that no other or further evidence was available to prove the issues on either side, so that in order to save expense to both parties the case was to be considered as being heard upon final trial and all the evidence before the Court as evidence adduced upon a trial on the merits. Whereupon the cause was submitted to the Court for determination on the merits as aforesaid. [143]



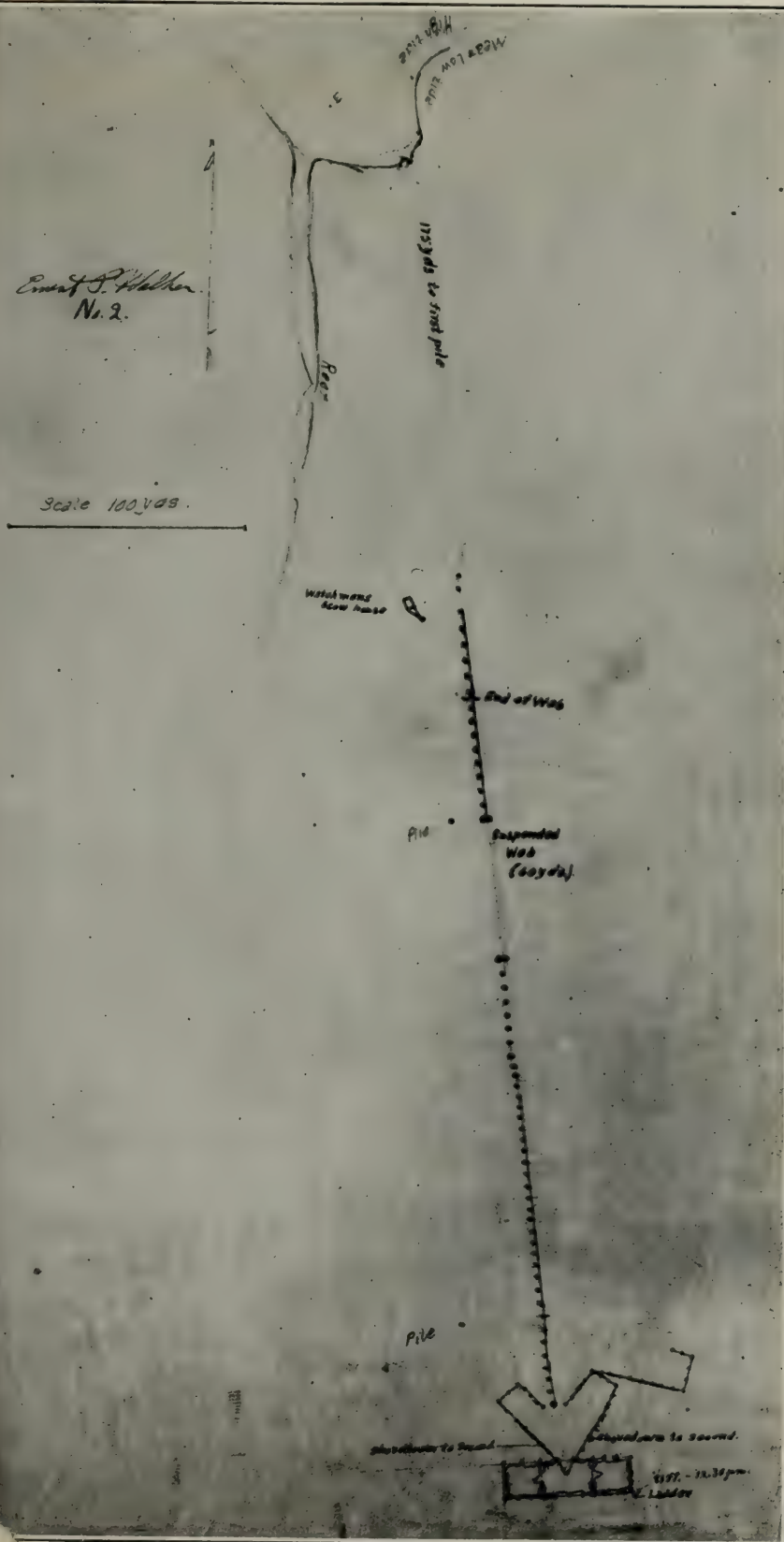


Exhibit No. 2 to Affidavit of Ernest P. Walker.

Defendant's Exhibit No. 1—Chart of Clarence Strait—Revillagigedo Channel and Portland Canal S. E. Alaska.

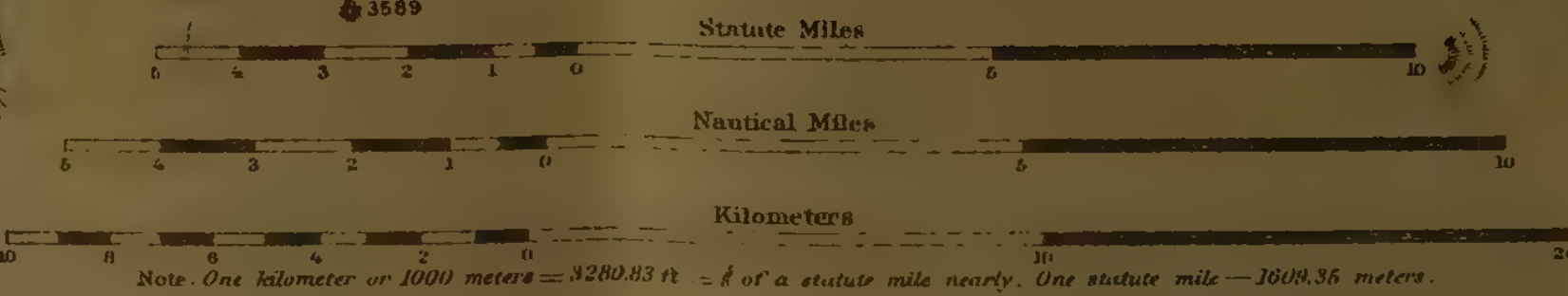
[Endorsed]: Defts. Exhibit No. 1. Received evidence Jun. 15, 1916, in Cause No. 263-KA. and 1468-A. J. W. Bell, Clerk. By John T. Reed, Deputy. [146]





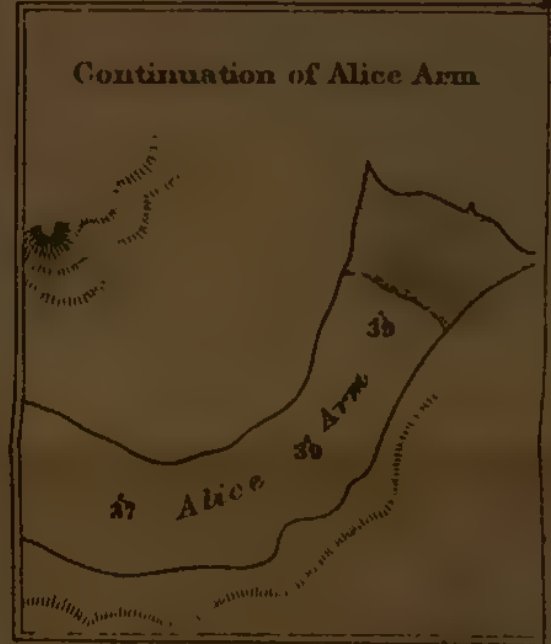
CLARENCE STRAIT
REVILLAGIGEDO CHANNEL
AND
PORTLAND CANAL
S.E. ALASKA

Scale 200,000

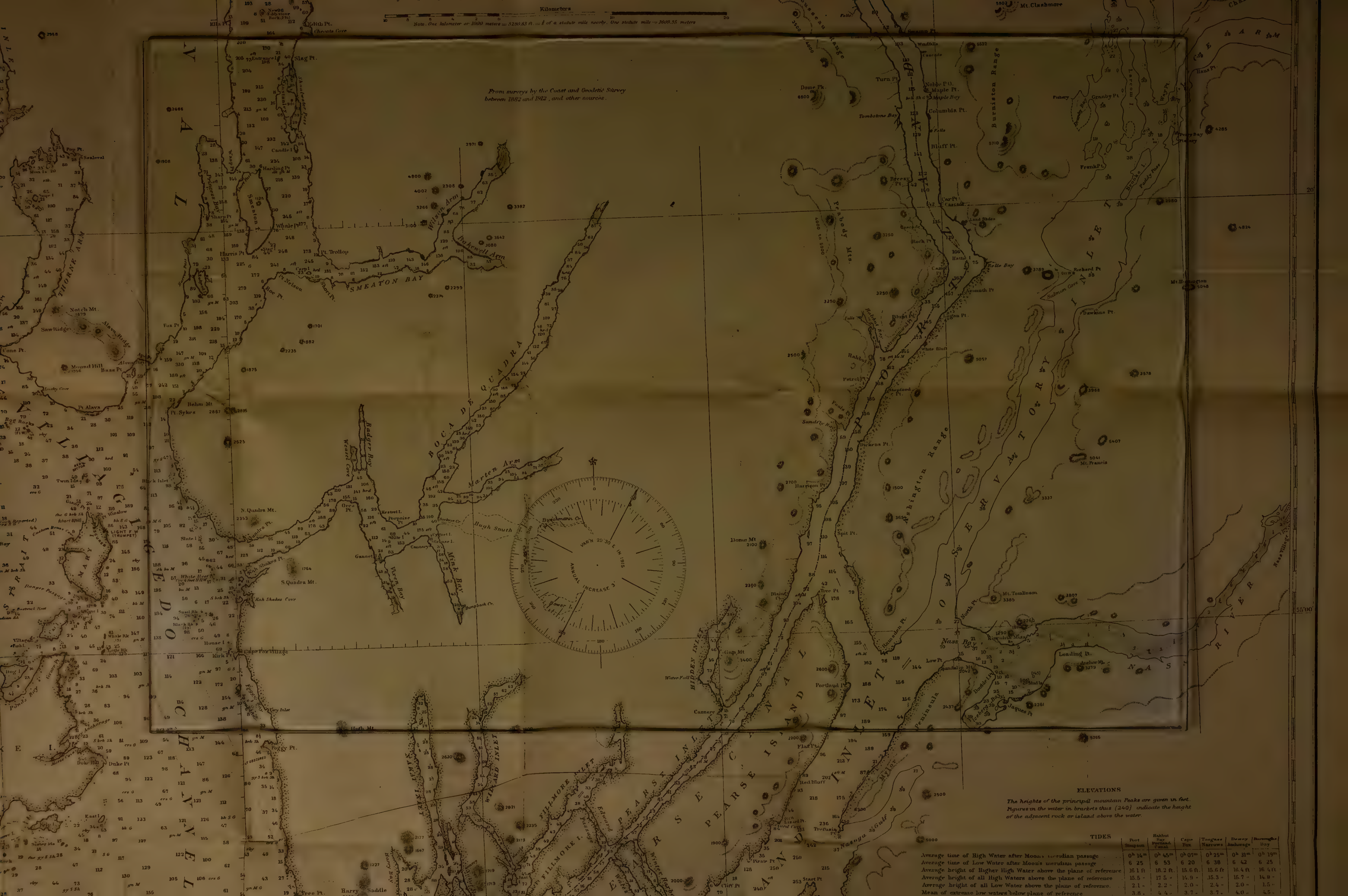


From surveys by the Coast and Geodetic Survey
between 1882 and 1912, and other sources.

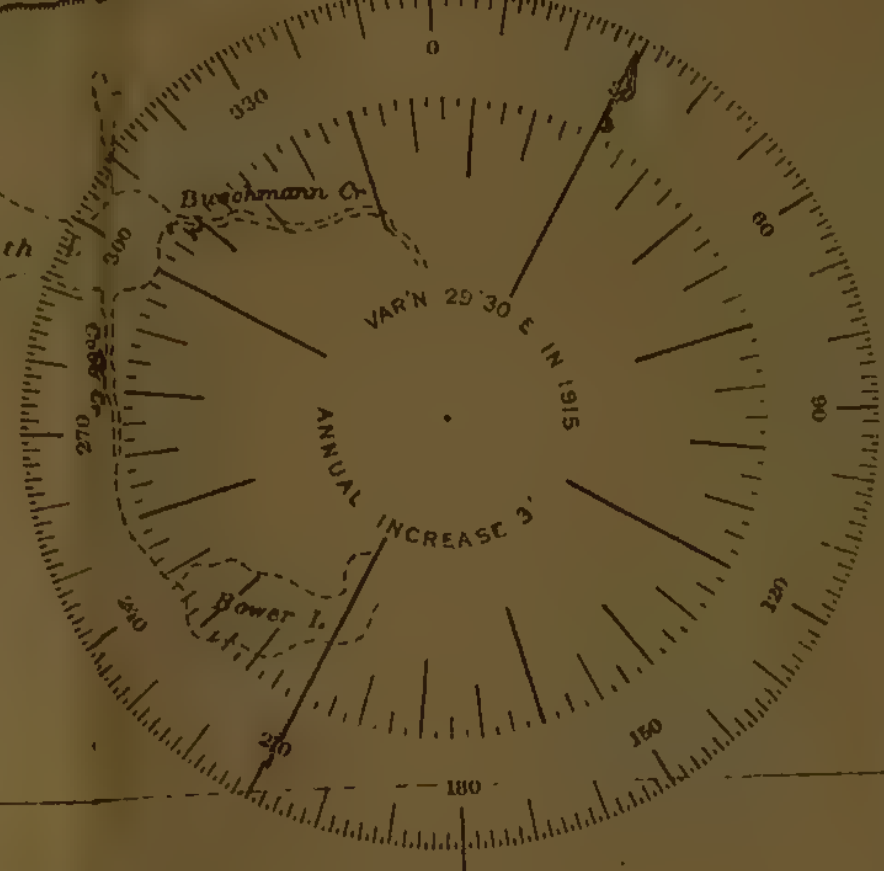
LIGHTS							
Name	Location	Longitude West from Greenwich	Character	Interval between flashes	Color of structure	Height above sea	Visibility in clear miles at 15 ft. elevation
Moose Island			F. W. R. Sec.		White	673 ft.	13 1/2
Tree Point			F. W. R. Sec.		White	861	15
Lincoln Rock			Gp. Fl. W.	10" 06"	Brown	572	13
Guard Island			Gp. Fl. W.	10" 06"	White	79	
Birnie Island			F. W.			65	10
Green Island			Fl. W.	10" 05 1/2"	White	81	14
Pointers Rocks			Fl. W.		Red	33	10
Cape Chatham			Gp. Fl. W.	10" 06"	White	50	







From surveys by the Coast and Geodetic Survey
between 1882 and 1912, and other sources.

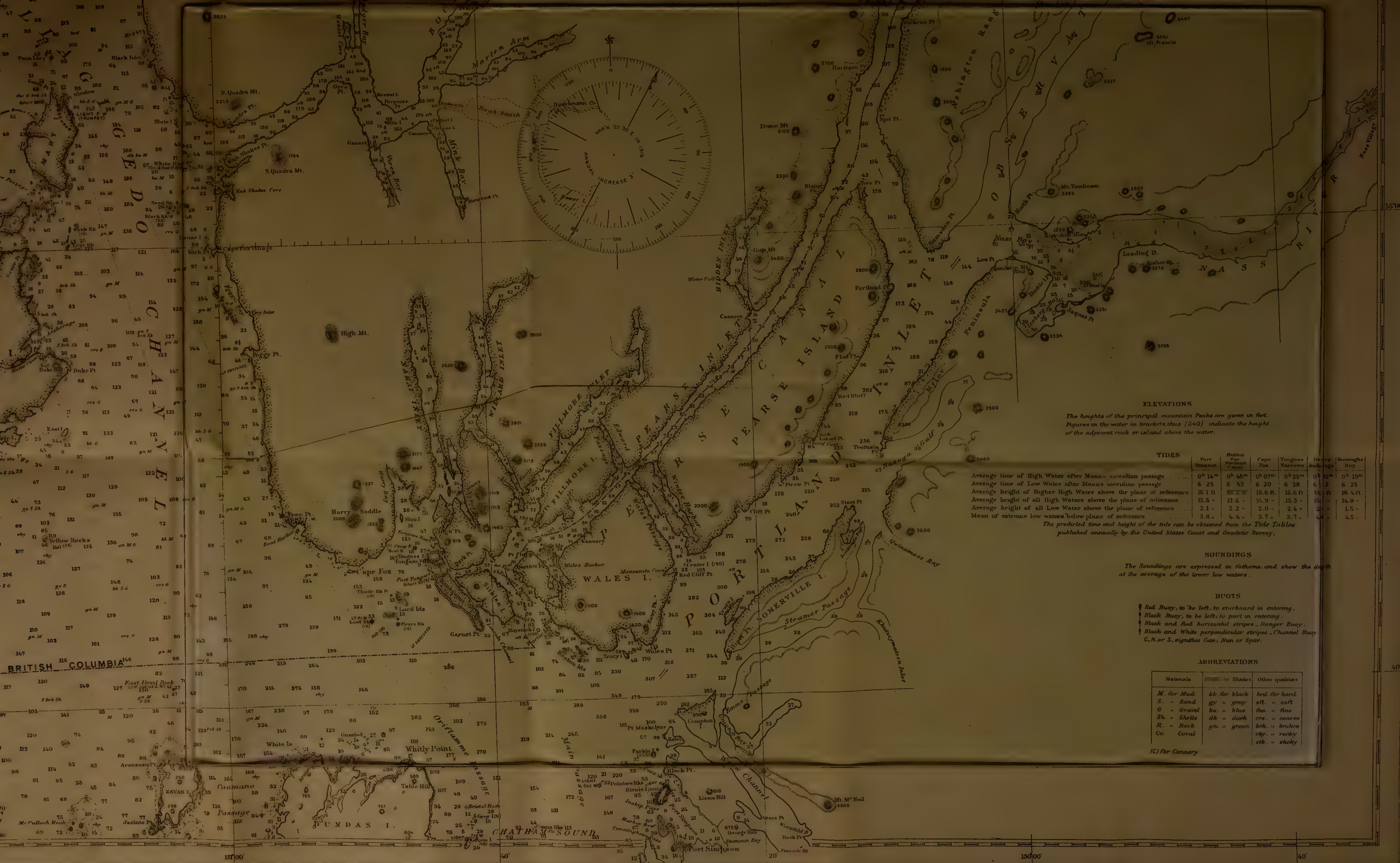


ELEVATIONS

The heights of the principal mountain Peaks are given in feet.
Figures in the water in brackets thus (240) indicate the height
of the adjacent rock or island above the water.

TIDES

	Port Simpson	Halifax Point Parsent	Cape Fox	Tongue Narrows	Deer Anchorage	Harbour Day
Average time of High Water after Moon's meridian passage	0 ^h 14 ^m	0 ^h 45 ^m	0 ^h 07 ^m	0 ^h 25 ^m	0 ^h 31 ^m	0 ^h 19 ^m
Average time of Low Water after Moon's meridian passage	6 25	6 53	6 20	6 38	6 42	6 25
Average height of Higher High Water above the plane of reference	16.1 ft	18.2 ft	15.6 ft	15.6 ft	16.4 ft	16.4 ft
Average height of all High Waters above the plane of reference	15.5	17.5	14.9	15.3	15.7	14.9
Average height of all Low Waters above the plane of reference	2.1	2.2	2.0	2.4	2.0	1.5
Mean of extreme low waters below plane of reference	3.8	4.4	3.7	3.7	4.0	4.5



ELEVATIONS
The heights of the principal mountain Peaks are given in feet. Figures in the water in brackets, thus (240) indicate the height of the adjacent rock or island above the water.

	Port Simpson	St. John's	Cap. Fox	Tongue Narrows	Deer Narrows	Burroughs Bay
Average time of High Water after Moon's meridian passage	0 ^h 14 ^m	0 ^h 45 ^m	0 ^h 07 ^m	0 ^h 25 ^m	0 ^h 11 ^m	0 ^h 19 ^m
Average time of Low Water after Moon's meridian passage	6 25	6 53	6 20	6 38	6 2	6 25
Average height of Higher High Water above the plane of reference	16.1 ft	15.6 ft	15.6 ft	15.6 ft	16.4 ft	16.4 ft
Average height of all High Water above the plane of reference	15.5	17.5	14.9	15.3	15	14.9
Average height of all Low Water above the plane of reference	2.1	2.2	2.0	2.4	2	1.5
Mean of extreme low waters below plane of reference	3.8	4.4	3.7	3.7	4	4.5

The predicted time and height of the tide can be obtained from the Tide Tables published annually by the United States Coast and Geodetic Survey.

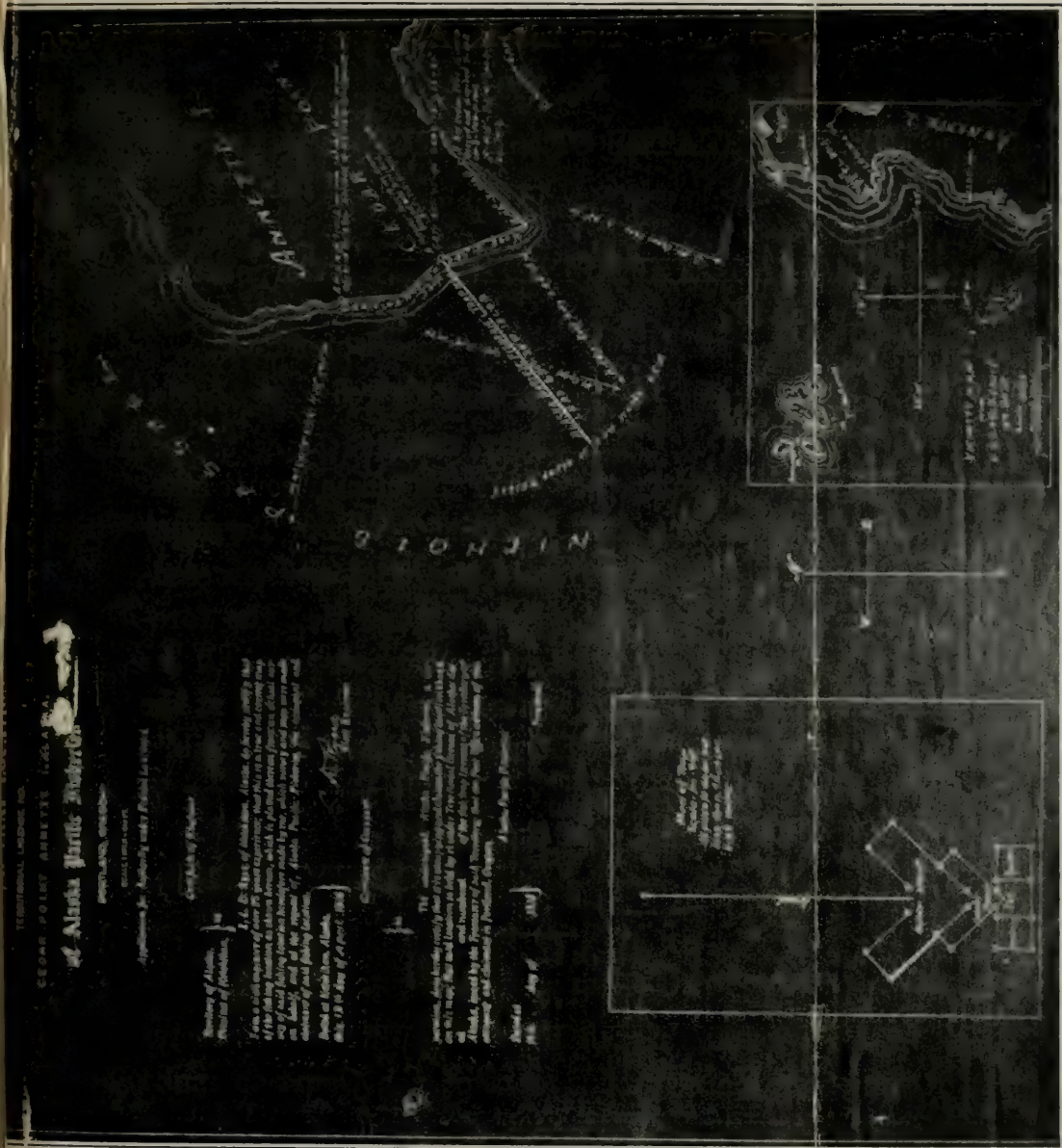
SOUNDINGS
The Soundings are expressed in fathoms, and show the depth at the average of the lower low waters.

- BUOYS**
- Red Buoy, to be left, to starboard in entering.
 - Black Buoy, to be left, to port in entering.
 - Black and Red horizontal stripes - Danger Buoy.
 - Black and White perpendicular stripes - Channel Buoy.
 - C, M, or S, signifies Can, Nun, or Spar.

Materials	Shades	Other qualities
M. for Mud	bk. for black	hnd. for hard
S. " Sand	gy. " gray	st. " soft
G. " Gravel	bl. " blue	fin. " fine
Sh. " Shells	dk. " dark	crs. " coarse
R. " Rock	gn. " green	brk. " broken
Co. Coral		rlg. " rocky
		stk. " sticky

(C) for Cannery

Defendant's Exhibit No. 2—Map of Fish-Trap Location—Cedar Point, Annette Island, Alaska.



[Endorsed]: Dft's Exhibit No. 2. Received in Evidence. Jun. 15, 1916. In Cause No. 263-KA, #1468-a. J. W. Bell, Clerk. By John T. Reed, Deputy. [147]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 263-K. A.

No. 1468-A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

**Certificate of Stenographer to Transcript of
Testimony, etc.**

I hereby certify that I am the official court stenographer for the First Judicial Division, Territory of Alaska; that I reported the trial and proceedings in the above-entitled cause and that the foregoing is a full, true and correct transcript of all the testimony and evidence introduced or offered at the trial of said cause, together with all of the exhibits on which the same was heard.

Dated this 8th day of July, 1916.

L. A. GREEN. [148]

Defendants' Proposed Findings of Fact.

BE IT FURTHER REMEMBERED that thereupon the defendants requested the Court to make the following Finding of Fact:

“Defendants’ Proposed Finding No. 1.

The Court finds that in August of the year 1915 the defendants, pursuant to observations

previously made, went upon the present site of the defendants' fish-trap off Cedar Point, Annette Island, and made soundings and by the use of a diver made such observations as were necessary to determine the question of the feasibility of constructing a fish-trap at that place, and in this connection the court finds that as the result of such observations the defendants decided that the driving and constructing of a fish-trap upon the site now occupied by the defendants' trap was practicable and feasible."

Which said request of the defendant to find the facts as indicated in said proposed Finding of Fact No. 1 was refused by the Court, the Court refusing to so find. To which ruling and order of the Court the defendant, by its counsel then and there excepted on the ground that the facts as stated in said Finding are material and said Finding is upon a material issue in the case, and facts therein stated are in accordance with the undisputed and unquestioned testimony given by the witnesses. Which exception was then and there allowed by the Court.

The defendant further requested the Court to make and adopt as the Finding of the Court Defendants' Proposed Finding No. 2, which is in words and figures as follows:

"Defendants' Proposed Finding No. 2.

The Court finds that pursuant to and subsequent to the observations made in the month of August, 1915, referred to in Defendants' Proposed Finding No. 1, the defendants decided to

drive and construct a fish-trap upon the site now occupied by the defendants' trap and to enlarge their cannery at Chomly by installing therein such additional machinery and equipments as were necessary to pack the fish that would be caught and supplied by the fish-trap to be constructed off Cedar Point; that in the fall of 1915, and the winter of 1915-16, the Chomly cannery of the defendants was so enlarged and so supplied [149] with additional equipment and machinery at an expense of approximately eighteen thousand five hundred (\$18,500.00) dollars.

That in the judgment of the defendants the trap to be constructed off Cedar Point would supply 600,000 fish which when canned, would fill 50,000 cases of canned salmon; that the defendants during the winter of 1915-16 contracted for the Chinese labor and purchased the tin and other supplies necessary to the canning of the said additional 50,000 cases of salmon at Chomly, at an expense to the defendants considerable in excess of twenty-five thousand (\$25,000.00) dollars."

The Court denied the request of the defendant to find the facts as set forth in Defendants' Proposed Finding No. 2 and refused to adopt said Finding so requested, to which ruling and order of the Court the defendant, by its counsel, then and there excepted on the ground that said Finding and the whole thereof and each and every part thereof is

upon a material issue in the case and is in accordance with the undisputed and unquestioned testimony in the case; that the testimony relating to the facts set up in said Finding were not in any wise contradicted by any witness upon the trial. Which said exception was then and there allowed by the Court.

The defendants further requested the Court to find the facts in accordance with and adopt as a Finding of Fact the Defendants' Proposed Finding of Fact No. 3, which is in words and figures as follows:

“Defendants' Proposed Finding No. 3.

That during the winter of 1915-16 the defendants procured the necessary piles and other equipment to drive and construct a trap off Cedar Point upon the site of the defendants' present trap and on the 7th day of April in the spring of the year 1916 commenced the driving of such trap and completed the driving thereof on the 18th day of April, 1916, and that the defendants expended in this behalf a sum in excess of four thousand (\$4,000.00) dollars.”

Which request of the defendant to make said Proposed Finding No. 3 was denied by the Court, and the Court refused to find the facts as therein stated, to which ruling and order of the [150] Court the defendants, by counsel, then and there excepted on the ground that each and every portion of said Finding and all the facts therein stated relate to and are upon a material issue in the case and are in exact

accord with the undisputed and unquestioned testimony in the case there being no contradictory testimony upon any of the matters or things referred to in said Finding. Which said exception was then and there allowed by the Court.

The defendant further requested the Court to find the facts in accordance with Defendants' Proposed Finding No. 4, and to adopt said Finding No. 4 as the Finding of the Court, which proposed Finding of Fact No. 4 is in words and figures as follows, to wit:

“Defendants' Proposed Finding No. 4.

That all available sites for fish-traps, so far as known to the defendants, within the area from which fish can be supplied to the Chomly cannery of the defendants, have been occupied and there are no salmon to be purchased upon the market within the area from which such salmon can be taken to Chomly and canned in order to furnish the Chomly cannery with the fish necessary to fill the 50,000 cases representing the increased capacity of the cannery.”

Which said request of the defendants was then and there denied by the Court, and the Court refused to find the facts as set forth in said Proposed Finding No. 4, and refused to adopt the same as the Finding of the Court. To which ruling and order of the Court the defendants, by counsel, then and there excepted, on the ground that said finding and the whole thereof and all the facts therein stated relate to material issues in the case and is in accord

with the undisputed testimony in the case, [151] there being no dispute upon any of the matters or facts in said Finding, which said exception was then and there allowed by the Court.

Findings of Fact.

Whereupon the Court made its Findings of Fact, which are as follows:

“Findings of Fact.

I.

That by the 15th section of the Act of Congress approved March 3, 1891, entitled ‘An Act to Repeal the Timber Culture Laws’ (26 Stats. L. 1101) and by the Proclamation of the President dated the 28th day of April, 1916, there was reserved from use, occupation, settlement or benefit by any except Metlakahtlans and other Indians, the following lands and waters, to wit: ‘The body of lands known as Annette Islands, situated in the Alexander Archipelago, in Southeastern Alaska, on the north side of Dixon’s Entrance’ and ‘the waters within 3000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets’ and ‘The bays of the said islands, rocks and islets’; and that by said Proclamation warning was ‘expressly given to all unauthorized persons not to fish in or use any of said waters.’ ”

To which said Finding of Fact 1 as made by the Court the defendant at the time objected on the

ground that said Finding does not relate to any fact in the case whatsoever and is not a correct construction of the Proclamation issued by the President, which objection was then and there overruled by the Court, to which ruling and order of the Court the defendants, by counsel, then and there excepted, which exception was then and there allowed by the Court.

Whereupon the Court made its Finding of Fact No. 2 which is in words and figures as follows:

“II.

That defendant being a corporation not composed in whole or in part of Metlakahtlans or other Indians, did, on the 7th day of April, 1916, without permission or authority from any one, enter upon the navigable waters of the [152] United States, within 3000 feet from the shore at mean low tide of Annette Island, and within the area so reserved, and did then and there begin the erection of a fish-trap in said waters, to that end driving a large number of piles in said navigable waters for the purpose of holding the web to be suspended between said piles, and on the 18th day of April said defendant had said apparatus complete for fishing with the exception of the suspension of the web, all at a cost to defendant of \$4000.00, or thereabouts.

That the said fish-trap so constructed or about to be constructed is a usual and ordinary fishing appliance such as is ordinarily used by those engaged in catching salmon in the waters of Southeastern Alaska.

That the portion of said trap nearest to the shore of Annette Island is situate 200 feet to the seaward from the line of extreme low tide, and that although the said trap is in navigable water of the United States technically speaking, it is not within any portion of the waters of the United States which are, or ever have been, used for the purposes of navigation, and is not in, and is not an obstruction to the navigable capacity of, any of the waters of the United States in the sense used in the Rivers and Harbors Act approved March 3, 1899."

Whereupon the Court made and adopted its Finding of Fact No. 3, which is in words and figures as follows:

"That prior to the issuance of the Proclamation hereinbefore mentioned T. A. Heckman, Superintendent of the defendant company, stated to P. E. Harris that he knew that a Proclamation in the premises was about to be issued by the Government."

To which said Finding of Fact No. 3 the defendants, by counsel, then and there objected on the grounds of exception hereinafter stated, and excepted on the ground that said finding is not supported by sufficient evidence and is contrary to the evidence, especially in this that it has not been proven that the President had any intention of issuing said Proclamation prior to the time that the same was actually issued, and that it is not to be assumed that anyone knew what the intention of

the President was in a matter of that character, the same being wholly within the breast of the President and such that it could not be known by anyone other than the President. Which said objection being [153] overruled, and exception duly taken at the time said Finding was made, the Court then and there allowed said exception.

Whereupon the Court made its Finding of Fact No. 4 which is in words and figures as follows, to wit:

“That on the 2d day of May, 1916, and before the fishing apparatus hereinbefore described had been made complete and effective for the catching of fish by the stringing of the web, the Assistant United States Attorney for the First Division of Alaska notified the defendant of the issuance of the said Proclamation of the President, and of its contents, and notified it to cease driving or attempting to drive any traps for the purpose of catching fish within said area, and further notified it not to commence fishing within said area.”

Whereupon the Court made its Finding of Fact No. 5 which is in words and figures as follows, to wit:

“That notwithstanding said Act, Proclamation and notice, said defendant did maintain at the time of the filing of this suit, and does now maintain possession of the area enclosed by said piles and refuses to remove the same and refuses to vacate the premises, and threatens and is about to and will, if not enjoined, perfect

said trap as a fishing device and will catch therein large numbers of valuable fish and will further trespass upon said land and water so reserved as aforesaid to the irreparable injury of plaintiff, both in its Sovereign capacity and as owner and proprietor, for which plaintiff would have no plain, speedy or adequate remedy at law.”

The defendants then and there objected and excepted to said Finding No. 5 as made by the Court on the ground that said Finding is not sustained by the evidence and is contrary to the evidence, more especially in this that there was no evidence to show that the plaintiff would be injured irreparably or otherwise by the maintenance of the fish-trap off Cedar Point referred to in said Finding either in its sovereignty capacity or as owner and proprietor, or in any other capacity whatsoever, which said objection being overruled, said exception was then and there allowed by the Court. [154]

Defendant's Proposed Conclusions of Law.

Whereupon the defendants asked the Court to conclude as a matter of law, and requested the Court to adopt as its Conclusion of Law. Defendants' Conclusion of Law No. 1, which is in words and figures as follows:

“Defendants' Proposed Conclusion of Law No. 1.

The Court holds as a matter of law that in the construction of a fish-trap off Cedar Point, Annette Island, and the maintenance thereof the defendants were engaged in the exercise of their

common right of fishery, and being so engaged in the exercise of a lawful right they acquired a vested right in said fish-trap from which they could not be divested by a subsequent proclamation of the President or otherwise without compensation.”

Which said request was then and there denied by the Court and the Court refused to adopt as its conclusion Conclusion of Law No. 1 proposed by the defendants, to which ruling and order of the Court the defendants, by counsel, then and there excepted on the ground that said conclusion follows from the facts found by the Court and also from the facts proven upon the trial of the cause, which said exception was then and there allowed by the Court.

The defendants further requested the Court to conclude as a matter of law and to adopt as the conclusion of law of the Court the Conclusion of Law No. 2 as proposed by the defendants, which is in words and figures as follows:

“Defendants’ Proposed Conclusion of Law No. 2.

The Court concludes as a matter of law that the reservation of Annette Island, as made by Act of Congress, March 3, 1891, reserved the lands to ordinary high-water mark only and did not include any of the navigable waters of the United States, and that the proclamation of the President referred to in the pleadings herein was made without authority of law in that the power to control and dispose of the territories and other property of the United States is by the Constitution vested in Congress.” [155]

Which said request of the defendants was then and there denied by the Court, and the Court then and there refused to conclude as a matter of law in accordance with Conclusion of Law No. 2 requested by the defendants, and to conclude as therein stated, to which ruling and order of the Court, the defendants, by counsel, then and there excepted on the ground that said Conclusion follows as a matter of law from the facts found and from the facts proven upon the trial of the cause, which said exception was then and there allowed by the Court.

The defendant further requested the Court to conclude as a matter of law as stated in Defendants' proposed Conclusion of Law No. 3 and to adopt said Conclusion of Law No. 3 as the Conclusion of the Court, which said conclusion of law so requested is in words and figures as follows:

“Defendants' Proposed Conclusion of Law No. 3.

From the facts found the Court concludes that the plaintiff is not entitled to the relief demanded or to any relief whatsoever.”

Which said request of the defendants was then and there denied by the Court and the Court then and there refused to conclude as a matter of law as requested and to adopt said Conclusion of Law as the Court's conclusion of law, to which ruling and order of the Court the defendants, by counsel, then and there excepted on the ground that said Conclusion follows as a matter of law from the facts found and from the facts proven upon the trial of the cause, which said exception was then and there allowed by the Court.

Conclusion of Law.

Whereupon the Court made and adopted its Conclusion of [156] Law, which is in words and figures as follows:

“CONCLUSION OF LAW

I.

That plaintiff is entitled to an injunction as prayed for in the complaint.”

to which ruling and order of the Court in so concluding as a matter of law, the defendants, by counsel then and there objected and excepted on the ground that upon the facts found, as well as upon the facts proven at the trial, the plaintiff is not entitled to an injunction or to any other relief whatsoever for the reasons, among others, that the original reservation of Annette Island did not include the area in which the fish-trap of the defendants was constructed; that the Proclamation of the President, referred to in the Findings was made without authority of Law and was in violation of the Constitution of the United States by which it is provided that Congress shall have control over the territory and property of the United States, and further, that the defendants, under the evidence and the facts found had a vested right to maintain the fish-trap off Cedar Point, referred to in the Findings and Pleadings herein; that they constructed the same in the exercise of the right of fishery and were rightfully maintaining the same at the time of the issuance of the President's Proclamation and at all times, and could not be deprived of its said fish-trap

or the use thereof without compensation and without due process or otherwise.

Now come the defendants and move the Court to settle and allow the above and foregoing as a true and correct Bill of Exceptions herein and to certify that the same contains all the [157] evidence in the case, and duly order that the same be made part of the record.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendants.

Order Settling Bill of Exceptions.

And now this matter coming on to be heard on the motion and request of the defendants that the above and foregoing Bill of Exceptions be allowed and settled as a true and correct Bill of Exceptions herein, and the request of the defendants that the Court certify that the same contains all the evidence in the cause and that it be made part of the record, and the Court being fully advised in the premises,

NOW ORDERS that the above and foregoing be, and the same is, settled and allowed as a true, full and correct Bill of Exceptions herein, and the Court hereby certifies that the above and foregoing Bill of Exceptions so settled and allowed by the Court contains all the evidence adduced at the trial and the whole thereof, and is a true, full and correct record of the proceedings had, and the Court further orders that the above and foregoing Bill of Exceptions hereby settled and allowed be, and the same is hereby, made a part of the record in this cause. The Court further certifies that the same was duly pre-

sented within the time allowed therefor by the court.

Done this 10th day of July, A. D. 1916.

ROBERT W. JENNINGS.

Entered Court Journal No. M, page 136. [158]

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

No. 263-K. A.

No. 1468-A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

Injunction and Final Decree.

This cause coming on to be heard heretofore, to wit, on the 15th day of June, 1916, by consent of the parties on the issues raised on the bill, answer and reply and on the motion theretofore filed for an injunction, and the Court having heard the evidence introduced by the respective parties, and the cause having been finally submitted to the Court on the 17th day of June, 1916, and the Court having duly considered the same and heretofore having filed its Opinion herein and having made its Findings of Fact and Conclusions of Law herein, now upon motion of the plaintiff,

IT IS HEREBY ORDERED AND DECREED that the Alaska Pacific Fisheries, a corporation, its

officers, agents, employees, and all persons acting by, through or under it or in privity with it, be and they are enjoined and restrained from doing any act or thing whatsoever in driving, constructing or completing any fish-trap or structure whatsoever on and at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets, all in Southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish-trap at or near Cedar Point, Annette Island, aforesaid, and from delivering or causing to be delivered any material whatsoever for the construction of fishing traps upon said reserve or in said waters.

[159]

AND IT IS FURTHER ORDERED AND DECREED that the defendant, the Alaska Pacific Fisheries, be and it is hereby ordered to vacate the lands and waters mentioned in the Proclamation of the President of the United States of April 28, 1916, and to remove therefrom and to remove any and all structures therefrom heretofore erected therein by it directly or indirectly, and to refrain from in any manner trespassing in and upon said waters and said reserve.

AND IT IS ORDERED that plaintiff herein have judgment for its costs and disbursements in this suit;

and hereof let execution issue. Defendant is allowed sixty days from this date within which to file proposed Bill of Exceptions.

Done in open court this 7th day of July, 1916.

ROBERT W. JENNINGS,

District Judge.

Entered Court Journal No. M, pages 128, 129.

Filed in the District Court, District of Alaska, First Division. Jul. 7, 1916. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [160]

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

No. 1468-A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Persons Acting by, Through, or Under It or in Privity With It,

Defendants.

*In the United States Circuit Court of Appeals for
the Ninth Circuit Holden at San Francisco.*

No. —.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting by, Through, or Under It or in
Privity With It,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for an Appeal.

The above-named Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, appellants herein, conceiving itself and themselves aggrieved by the judgment and decree rendered herein on the 7th day of July, A. D. 1916, adjudging and decreeing, among other things, that the Alaska Pacific Fisheries, a corporation, its officers, agents, employees and all persons acting by, through or under it or in privity with it, be and they are enjoined and restrained from doing any act or thing whatsoever in driving, constructing or completing any fish-trap [161] or structure whatsoever on and at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the ad-

jacent rocks and islets, all in southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish-trap at or near Cedar Point, Annette Island, aforesaid, and from delivering or causing to be delivered any material whatsoever for the construction of fishing-traps upon said reserve or in said waters. And further ordering and decreeing that the defendant, the Alaska Pacific Fisheries, be and it is hereby ordered to vacate the lands and waters mentioned in the Proclamation of the President of the United States of April 28, 1916, and to remove any and all structures therefrom prior to the date of the decree erected therein by it directly or indirectly and to refrain from in any manner trespassing in and upon said waters and said reserve, and further giving the plaintiff a judgment for costs and disbursements, which said judgment and decree was rendered in favor of the plaintiff and against the said defendants and was rendered by the Honorable Robert W. Jennings, Judge of the District Court for the District of Alaska, Division Number One, on the day above mentioned, and the above-named Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, the defendants above named, and each of said defendants, do hereby appeal from said judgment and decree to the United States Circuit [162] Court of Appeals for the Ninth Circuit, and that the above-named appellants,

and each of them, do further pray that it and they may be allowed an appeal from said judgment and decree and from the whole and every part thereof to the said United States Circuit Court of Appeals for the Ninth Circuit as prayed for, and the appellants and each of them further pray that it and they may be given a supersedeas herein in order that the decree complained of may not be enforced against it or them until the errors herein complained of can be reviewed by the said United States Circuit Court of Appeals for the Ninth Circuit.

HELLENTHAL & HELLENTHAL,

C. H. HANFORD,

JAMES M. SHOUP.

Filed in the District Court, District of Alaska,
First Division. Jul. 10, 1916. J. W. Bell. Clerk.
By —————, Deputy. [163]

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

No. 1468-A.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting by, Through or Under It or in
Privity With It,

Defendants.

Application for Supersedeas.

*In the United States Circuit Court of Appeals for
the Ninth Circuit Holden at San Francisco.*

No. —.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting by, Through or Under It or in
Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Come now the defendants and appellants herein, a petition for an appeal having been filed asking the Court to permit an appeal herein to the Circuit Court of Appeals for the Ninth Circuit holden at San Francisco, and apply to the Court for a Supersedeas herein in order that the judgment and decree heretofore rendered herein may not be enforced and may be stayed during the pendency of the appeal and in this connection the defendants and appellants respectfully direct the Court's attention to the testimony adduced upon the trial by which it is conclusively shown that the defendants and appellants would be damaged in a sum not less than fifty thousand dollars if they [164] were prevented from operating and fishing the fish-trap at Cedar Point in controversy in this case during the season of 1916, while the plaintiff and appellee would suffer no dam-

age whatsoever because of the operation of said fish-trap by the defendants and appellants during the season of 1916, which said fishing season has just commenced.

And the Court's attention is directed to the further fact that since the decree contains a mandatory injunction directing the defendants and appellants to remove the fish-trap at Cedar Point, the execution of the decree would place the defendants where they could not be restored to their rights in the event of a reversal by the Circuit Court of Appeals.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendants and Appellants.

Filed in the District Court, District of Alaska,
First Division. Jul. 10, 1916. J. W. Bell, Clerk.
By —————, Deputy. [165]

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

No. 1468-A.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting by, Through or Under It or in
Privity With It,
Defendants.

*In the United States Circuit Court of Appeals for
the Ninth Circuit Holden at San Francisco.*

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting by, Through or Under It, or in
Privity With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Assignment of Errors.

Come now the Alaska Pacific Fisheries, a corpora-
tion, its officers, agents, employees, and all persons
acting by, through or under it or in privity with it,
the appellants herein, and assign the following errors
made by the trial court as the errors upon which the
said appellants will rely for a reversal of the judg-
ment and decree rendered herein:

FIRST ERROR ASSIGNED.

That the District Court for the Territory of
Alaska, Division Number One, erred in refusing to
make and adopt Finding of Fact No. 1 as requested
by the appellant and to find the facts as stated in said
Finding of Fact No. 1, which said proposed [166]
Finding of Fact No. 1 is in words and figures as fol-
lows:

“Defendants’ Proposed Finding No. 1.

The Court finds that in August of the year
1915, the defendants, pursuant to observations

previously made, went upon the present site of the defendants' fish-trap off Cedar Point, Annette Island, and made soundings and by the use of a diver made such observations as were necessary to determine the question of the feasibility of constructing a fish-trap at that place, and in this connection the Court finds that as the result of such observations the defendants decided that the driving and constructing of a fish-trap upon the site now occupied by the defendants' trap was practicable and feasible."

SECOND ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 2 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 2, which said proposed Finding of Fact No. 2 is in words and figures as follows:

"Defendants' Proposed Finding No. 2.

The Court finds that pursuant to and subsequent to the observations made in the month of August, 1915, referred to in Defendants' Proposed Finding No. 1, the defendants decided to drive and construct a fish-trap upon the site now occupied by the defendants' trap and to enlarge their cannery at Chomly by installing therein such additional machinery and equipments as were necessary to pack the fish that would be caught and supplied by the fish-trap to be constructed off Cedar Point; that in the fall of 1915,

and the winter of 1915-16, the Chomly cannery of the defendants was so enlarged and so supplied with additional equipment and machinery at an expense of approximately eighteen thousand five hundred (\$18,500.00) dollars.

That in the judgment of the defendants the trap to be constructed off Cedar Point would supply 600,000 fish which, when canned, would fill 50,000 cases of canned salmon; that the defendants during the winter of 1915-16 contracted for the Chinese labor and purchased the tin and other supplies necessary to the canning of the said additional 50,000 cases of salmon at Chomly, at an expense to the defendants considerable in excess of twenty-five thousand (\$25,000.00) dollars.” [167]

THIRD ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 3 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 3, which said proposed Finding of Fact No. 3 is in words and figures as follows:

“Defendants’ Proposed Finding No. 3.

That during the winter of 1915-16 the defendants procured the necessary piles and other equipment to drive and construct a trap off Cedar Point upon the site of the defendants’ present trap and on the 7th day of April in the spring of the year 1916 commenced the driving

of such trap and completed the driving thereof on the 18th day of April, 1916, and that the defendants expended in this behalf a sum in excess of four thousand (\$4,000.00) dollars.”

FOURTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 4 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 4, which said proposed Finding of Fact No. 4 is in words and figures as follows:

“Defendants’ Proposed Finding No. 4.

That all available sites for fish-traps, so far as known to the defendants, within the area from which fish can be supplied to the Chomly cannery of the defendants, have been occupied and there are no salmon to be purchased upon the market within the area from which such salmon can be taken to Chomly and canned in order to furnish the Chomly cannery with the fish necessary to fill the 50,000 cases representing the increased capacity of the cannery.”

FIFTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 1 and in finding the facts as in said Finding No. 1 [168] stated, which Finding No. 1 as made by the Court is in words and figures as follows:

“That by the 15th section of the Act of Congress approved March 3, 1891, entitled ‘An Act to Repeal the Timber Culture Laws’ (26 Stats. L. 1101) and by the Proclamation of the President dated the 28th day of April, 1916, there was reserved from use, occupation, settlement or benefit by any except Metlakahtlans and other Indians, the following lands and waters, to wit: ‘The body of lands known as Annette Islands, situate in the Alexander Archipelago, in Southeastern Alaska, on the North side of Dixon’s Entrance’ and ‘the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets’ and ‘the bays of the said islands, rocks and islets’; and that by said Proclamation warning was ‘expressly given to all unauthorized persons not to fish in or use any of said waters.’ ”

SIXTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 3 and in finding the facts as in said Finding No. 3 stated, which Finding No. 3 as made by the Court is in words and figures as follows:

“That prior to the issuance of the Proclamation hereinbefore mentioned T. A. Heckman, Superintendent of the defendant company, stated to P. E. Harris that he knew that a Proc-

clamation in the premises was about to be issued by the Government.”

SEVENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 5 and in finding the facts as in said Finding No. 5 stated, which Finding No. 5 as made by the Court is in words and figures as follows:

“That notwithstanding said Act, Proclamation and notice, said defendant did maintain at the time of the filing of this suit, and does now maintain possession of the area enclosed by said piles and refuses to remove the same and refuses to vacate the premises, and threatens and is about to and will, if not enjoined, perfect said trap as a fishing device and will catch [169] therein large numbers of valuable fish and will further trespass upon said land and water so reserved as aforesaid to the irreparable injury of plaintiff, both in its Sovereign capacity and as owner and proprietor, for which plaintiff would have no plain, speedy or adequate remedy at law.”

EIGHTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 1 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 1, is in words and figures as follows:

“Defendants’ Proposed Conclusion of Law No. 1.

The Court holds as a matter of law that in the construction of a fish-trap off Cedar Point, Annette Island, and the maintenance thereof the defendants were engaged in the exercise of their common right of fishery, and being so engaged in the exercise of a lawful right they acquired a vested right in said fish-trap from which they could not be divested by a subsequent proclamation of the President or otherwise without compensation.”

NINTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 2 requested by the defendants, which said Defendants’ Proposed Conclusion of Law No. 2 is in words and figures as follows:

“Defendants’ Proposed Conclusion of Law No. 2.

The Court concludes as a matter of law that the reservation of Annette Island as made by Act of Congress March 3, 1891, reserved the lands to ordinary high-water mark only and did not include any of the navigable waters of the United States, and that the proclamation of the President referred to in the pleadings herein was made without authority of law in that the power to control and dispose of the territories

and other property of the United States is by the Constitution vested in Congress.” [170]

TENTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 3 requested by the Defendants, which said Defendants’ Proposed Conclusion of Law No. 3 is in words and figures as follows:

“Defendants’ Proposed Conclusion of Law No. 3.

From the facts found the Court concludes that the plaintiff is not entitled to the relief demanded or to any relief whatsoever.”

ELEVENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in concluding as a matter of law and making and entering its Conclusion of Law, which is in words and figures as follows:

“That plaintiff is entitled to an injunction as prayed for in the complaint.”

TWELFTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in entering its judgment and decree herein, which is in words and figures as follows:

*"In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1468-A.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants.

INJUNCTION AND FINAL DECREE.

This cause coming on to be heard heretofore, to wit, on the 15th day of June, 1916, by consent of the parties on the [171] issues raised on the bill, answer and reply and on the motion theretofore filed for an injunction, and the Court having heard the evidence introduced by the respective parties, and the cause having been finally submitted to the Court on the 17th day of June, 1916, and the Court having duly considered the same and heretofore having filed its Opinion herein and having made its Findings of Fact and Conclusions of Law herein, now upon motion of the plaintiff.

IT IS HEREBY ORDERED AND DECREED that the Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, be and they are enjoined and restrained from doing any act or thing whatsoever in driving, constructing or completing any fish-trap or structure whatsoever on and

at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets, all in Southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish-trap at or near Cedar Point, Annette Island, aforesaid, and from delivering or causing to be delivered any material whatsoever for the construction of fishing traps upon said reserve or in said waters.

AND IT IS FURTHER ORDERED AND DECREED that the defendant, the Alaska Pacific Fisheries, be and it is hereby ordered to vacate the lands and waters mentioned in the Proclamation of the President of the United States of April 28, 1916, and to remove therefrom and to remove any and all structures therefrom heretofore erected therein by it directly or indirectly, and to refrain from in any manner trespassing in and upon said waters and said reserve.

AND IT IS ORDERED that plaintiff herein have judgment for its costs and disbursements in this suit; and hereof let execution issue. Defendant is allowed 60 days from this date within which to file proposed Bill of Exceptions.

Done in open court this 7th day of July, 1916.

ROBERT W. JENNINGS,
District Judge."

HELLENTHAL & HELLENTHAL,
C. H. HANFORD,
JAMES M. SHOUP,

Attorneys for Appellants.

Due service by copy admitted this 10th day of
July, 1916.

JAMES A SMISER,
Attorneys for Appellee.

Filed in the District Court, District of Alaska,
First Division. Jul. 10, 1916. J. W. Bell, Clerk.
By —————, Deputy. [172]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 243-K, A.

No. 1468-A.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
et al.,

Defendants,

Order Allowing Appeal, etc.

Now, on this 10th day of July, came on to be heard
the petition of the defendants in the above-entitled
cause for an order allowing their appeal herein as

prayed for in their petition filed this day, and that a supersedeas of the decree heretofore entered herein be allowed pending said appeal, and fixing the amount of bond in the premises; and the Court being fully advised doth allow said appeal and doth grant said request for a supersedeas so far as all that part of the decree is concerned which awards costs and disbursements and orders the defendants to remove any and all structures from the disputed area; and doth deny said request for a supersedeas so far as the remainder of the decree is concerned. And the amount of bond on appeal is hereby fixed at \$250.00, same to act as a supersedeas as hereinbefore granted.

Dated this 10th day of July, 1916.

ROBERT W. JENNINGS,

Judge.

Entered Court Journal, No. M, page 134.

The defendants except to the ruling and order of the Court in denying the supersedeas.

Filed in the District Court, District of Alaska, First Division. Jul. 10, 1916. J. W. Bell, Clerk.
By —————, Deputy. [173]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

*In the United States Circuit Court of Appeals for
the Ninth Circuit, Holden at San Francisco.*

No. 263-K, A.

No. 1468-A.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting By, Through or Under It or in
Privity with It,

Defendants,

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and All Per-
sons Acting By, Through or Under It or in
Privity with It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, the Alaska Pacific Fisheries, a Corpora-
tion, appellant herein, and B. M. Behrends, surety,
all residents of the Territory of Alaska, are held
firmly bound unto the above-named United States

of America, appellee, in the sum of Two Hundred *Fifty*, to be paid to the said appellee for the payment of which well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, administrators and assigns and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of July, in the year of our Lord, one thousand nine hundred and sixteen. [174]

Whereas the above-named Alaska Pacific Fisheries, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and decree rendered in the above-entitled suit by Robert W. Jennings, Judge of the District Court for the Territory of Alaska,

Now, therefore, the condition of this obligation is such that if the above-named Alaska Pacific Fisheries shall prosecute its said appeal to effect and answer all costs, if they fail to make said appeal good then this obligation shall be void; otherwise the same shall be in full force and effect.

ALASKA PACIFIC FISHERIES.

By S. HELLENTHAL, [Seal]

Its Attorney.

B. M. BEHREND, [Seal]

Surety.

Approved.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska,
First Division. Jul. 10, 1916. J. W. Bell, Clerk.
By —————, Deputy. [175]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

*In the United States Circuit Court of Appeals for
the Ninth Circuit, Holden at San Francisco.*

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees and All Per-
sons Acting By, Through or Under It or in
Privity With It,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Citation on Appeal.

THE UNITED STATES OF AMERICA,—ss.
To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, within thirty (30) days from and after this date, pursuant to an *appealed* filed in the clerk's office of the District Court for the Territory of Alaska, Division Number One, at Juneau, in the above-entitled cause, wherein the Alaska Pacific Fisheries, a corporation, the appellant herein, was the defendant, and the United States of America, the appellee herein, was

the plaintiff, to show cause, if any there be, why the judgment and decree entered in said cause of the United States of America vs. Alaska Pacific Fisheries, a corporation, its officers, agents, employees, and all persons acting by, through or under it or in privity with it, and referred to in the petition for an appeal filed in said [176] cause, which said appeal was by order of the Court allowed as prayed for, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the United States this 10th day of July, in the year of our Lord one thousand nine hundred and sixteen.

ROBERT W. JENNINGS,
Judge of the District Court for the Territory of
Alaska, Division Number One.

Copy of the foregoing received and service admitted this 10th day of July, 1916.

[Seal]

JAMES A. SMISER,
U. S. Atty.

Filed in the District Court, District of Alaska,
First Division. Jul. 10, 1916. J. W. Bell, Clerk.
By ———, Deputy. [177]

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

*In the United States Circuit Court of Appeals for
the Ninth Circuit, Holden at San Francisco.*

No. 263-K.A.

No. 1468-A.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and all Per-
sons Acting by, Through or Under It or in
Privity With It,

Defendants.

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees, and all Per-
sons Acting by, Through or Under It or in
Privity With It,

Appellants.

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Praeceptum for Transcript of Record.

To the Clerk of the District Court for the Territory
of Alaska, Division Number One.

You will kindly prepare and transmit to the Cir-
cuit Court of Appeals for the Ninth Circuit in con-
nection with the appeal herein copies of the follow-

ing papers and documents herein: Complaint, Answer, Reply, Opinion, Bill of Exceptions, Decree, Petition for an Appeal, Application for Supersedeas, Assignment of Errors, Order Allowing Appeal, Bond on Appeal, Original Citation on Appeal, together with acceptance of service thereon, and this Praeceptum.

HELLENTHAL & HELLENTHAL,

Attorneys for Appellants.

Filed in the District Court, District of Alaska, First Division. Jul. 20, 1916. J. W. Bell, Clerk. By —————, Deputy. [178]

*In the District Court for the District of Alaska,
Division No. 1, at Juneau.*

United States of America,
District of Alaska,
Division No. 1,—ss.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 178 pages of typewritten matter, numbered from 1 to 178, both inclusive, constitute a full, true and complete copy, and the whole thereof, prepared in accordance with the praecipe of defendant and plaintiff in error, on file in my office and made a part hereof, in Cause No. 263-K.A. and No. 1468-A, wherein the United States of America is plaintiff and defendant in error, and Alaska Pacific Fisheries, a corporation, is defendant and plaintiff in error.

I further certify that the said record is by virtue of an appeal and citation issued in this cause, and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to Eighty-one and 45/100 Dollars (\$81.45), has been paid to me by plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 24th day of July, 1916.

[Seal]

J. W. BELL,
Clerk.

By _____,
Deputy.

[Endorsed]: No. 2828. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Pacific Fisheries, a Corporation, Its Officers, Agents, Employees, and All Persons Acting by, Through or Under it or in Privity With it, Appellant, vs. The United States of America, Appellee. Transcript of Record Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed August 7, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

Case No. 2828.

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANTS.

Upon Appeal from the District Court for the Territory of
Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
C. H. HARFORD,
JAMES M. SHOUP,

Attorneys for Appellants.

THE JAMES H. BARRY CO.

Filed

OCT 4 - 1915

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

ALASKA PACIFIC FISHERIES, a corporation, et al.,	} <i>Appellants,</i>	} No. 2828
vs.		
UNITED STATES OF AMERICA,	} <i>Appellee.</i>	

BRIEF OF APPELLANTS.

STATEMENT OF FACTS.

This is an appeal from a decree entered by the District Court for the Territory of Alaska, enjoining the appellants from maintaining a fish trap situate in the navigable waters of the United States to the seaward of the westerly shore of Annette Island.

Annette Island forms part of the Alexander Archipelago and is situate near the southernmost boundary line of Alaska. On it is situate the Indian village of Metlakahtla, founded in about the year 1886 by a

colony of Indians under the leadership of Father Duncan. These Indians migrated to Annette Island from a village in British Columbia known as "Old Metlakahtla." Some years prior to 1886 Father Duncan had proceeded to Old Metlakahtla, British Columbia, as a missionary. He had made a great deal of progress in teaching the Indians useful trades and occupations and otherwise inducing them to adopt the habits of civilization, when some dispute arose between him and the Bishop, who was his superior in this particular field, which resulted in the recall of the former. After being thus deposed Father Duncan gathered about him a colony of the Metlakahtla Indians and emigrated from British Columbia to Annette Island, Alaska. This was about the year 1886.

In the year 1887, the matter having been called to the attention of the Interior Department, the Secretary of the Interior addressed an inquiry to the Attorney General with a view of ascertaining whether the President could not by proclamation set aside Annette Island for the use and benefit of the Metlakahtla Indians. The Attorney General, being of the opinion that the President could not reserve lands for the use of British Columbia Indians, the matter was submitted to Congress with the result that an Act setting aside Annette Island for the use of the Metlakahtlans was passed.

Under the leadership of Father Duncan the Metlakahtla Indians built the village of New Metla-

kahtla on Annette Island. A church, school house and store building, as well as numerous Indian houses were erected, and in more recent years a cannery and a saw mill. This cannery and saw mill were operated for several years, until about three years ago, when the Bureau of Education deposed Father Duncan from the leadership of the Metlakahtlans and placed another person in charge of their affairs. This action on the part of the Bureau of Education was followed by a chaotic condition in the affairs of the Metlakahtlans. Neither the cannery nor saw mill were since operated. Strife, finding its origin on the one hand in wounded pride and a growing sense of injustice, and on the other in a desire for power, was waged continuously between the deposed leader and the Bureau of Education.

In the spring of 1916, after the inability of the Bureau of Education to operate the cannery as it had been operated by Father Duncan was clearly demonstrated by the fact that the cannery had been continuously idle since the Bureau had taken charge of it, arrangements were made to lease the cannery to a white man named P. E. Harris, who was also operating another cannery in the waters of Southeastern Alaska. After the cannery had been so leased to a white cannery operator, a private fishery was created by Executive Proclamation in the waters surrounding Annette Island, ostensibly for the benefit of the Metlakahtla Indians. The cannery having been leased to

a white man, however, the lessee of the cannery became the real beneficiary under this Executive Proclamation.

The Alaska Pacific Fisheries, the appellant, is the owner of three salmon canneries situate in South-eastern Alaska. Two of these canneries, one situate at Yes Bay and the other at Chomly Sound, more especially the latter, depend for their fish supply in part upon salmon caught in the waters surrounding Annette Island.

Prior to the year 1916 these fish had been caught principally in the fish trap referred to in the evidence as the Brendible trap. In August, 1915, pursuant to observations that had been previously made, and which had established the fact that the navigable waters off Cedar Point afforded a valuable site for a fish trap, the officers and agents of the appellant by the aid of a diver explored the bed of the ocean with a view of determining whether a fish trap could be driven in that locality (See evidence Burckhardt, Record, page 86). Having ascertained that this could be done, steps were taken in the fall of 1915 to procure the necessary piles. It was calculated that this trap would, when in operation, catch 600,000 fish during the fishing season. Accordingly appellant's cannery at Chomly was, during the winter of 1915 and 1916, enlarged sufficiently and the necessary machinery installed to can this additional supply of fresh salmon at an expense of eighteen thousand five hundred

(\$18,500.00) dollars (See evidence Burckhardt, Record, page 114). During this same winter contracts were also made for the additional Chinese labor necessary to put up this increased pack, and tin and other supplies required in that connection were purchased and shipped to Chomly (See evidence Burckhardt, Record, pages 87 and 89).

On the 7th day of April, 1916, the work of driving the piles for the trap off Cedar Point was commenced, and this work was completed on the 18th day of April, 1916 (See Finding No. 2, Record, page 188, evidence Burckhardt, Record, page 87, and evidence Jenkins, Record, page 152). Following this and on the 28th day of April, 1916, the President's proclamation, hereinabove referred to, was issued.

The trap, as constructed, is situate in the navigable waters of the United States so far to the seaward from the westerly coast of Annette Island that the portion of the trap nearest to the shore is two hundred (200) feet to the seaward of the line of extreme low tide (See Finding No. 2, Record, page 119), and the entire trap is embraced within the area referred to in the President's proclamation.

After the issuance of the proclamation, the appellant was requested to cease carrying on its fishing operations within the area referred to in the President's proclamation, and upon its failure so to do, this suit was brought to enjoin it from maintaining and operating the fish trap above referred to. The lower

court entered a decree prohibiting the appellant from going upon any of the waters surrounding Annette Island within three thousand feet of the shore thereof, and compelling it to remove whatever structures it had placed and was maintaining within this area. This appeal is from the decree so entered.

ERRORS ASSIGNED.

Twelve errors are assigned which read as follows:

FIRST ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 1 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 1, which said proposed Finding of Fact No. 1 is in words and figures as follows:

"Defendant's Proposed Finding No. 1.

"The Court finds that in August of the year 1915 the defendants, pursuant to observations previously made, went upon the present site of the defendants' fish trap off Cedar Point, Annette Island, and made soundings and by the use of a diver made such observations as were necessary to determine the question of feasibility of constructing a fish trap at that place, and in this connection the Court finds that as the result of such observations the defendants decided that the driving and constructing of a fish trap upon the site now occupied by the defendants' trap was practicable and feasible."

SECOND ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 2 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 2, which said proposed Finding of Fact No. 2 is in words and figures as follows:

“Defendants’ Proposed Finding No. 2.

“The Court finds that pursuant to and subsequent to the observations made in the month of August, 1915, referred to in Defendants’ Proposed Finding No. 1, the defendants decided to drive and construct a fish trap upon the site now occupied by the defendants’ trap and to enlarge their cannery at Chomly by installing therein such additional machinery and equipments as were necessary to pack the fish that would be caught and supplied by the fish trap to be constructed off Cedar Point; that in the fall of 1915, and the winter of 1915-16, the Chomly cannery of the defendants was so enlarged and so supplied with additional equipment and machinery at an expense of approximately eighteen thousand five hundred (\$18,500) dollars.

“That in the judgment of the defendants the trap to be constructed off Cedar Point would supply 600,000 fish which, when canned, would fill 50,000 cases of canned salmon; that the defendants during the winter of 1915-16 contracted for the Chinese labor and purchased the tin and other supplies necessary to the canning of the said additional 50,000 cases of salmon at Chomly, at an expense to the defendants considerably in excess of twenty-five thousand (\$25,000) dollars.”

THIRD ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 3 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 3, which said proposed Finding of Fact No. 3 is in words and figures as follows:

"Defendants' Proposed Finding No. 3.

"That during the winter of 1915-16 the defendants procured the necessary piles and other equipment to drive and construct a trap off Cedar Point upon the site of the defendants' present trap, and on the 7th day of April in the spring of the year 1916 commenced the driving of such trap and completed the driving thereof on the 18th day of April, 1916, and that the defendants expended in this behalf a sum in excess of four thousand (\$4,000) dollars."

FOURTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 4 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 4, which said proposed Finding of Fact No. 4 is in words and figures as follows:

"Defendants' Proposed Finding No. 4.

"That all available sites for fish traps, so far as known to the defendants, within the area from

which fish can be supplied to the Chomly cannery of the defendants, have been occupied and there are no salmon to be purchased upon the market within the area from which such salmon can be taken to Chomly and canned in order to furnish the Chomly cannery with the fish necessary to fill the 50,000 cases representing the increased capacity of the cannery."

FIFTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One erred in making and adopting its Finding of Fact No. 1 and in finding the facts as in said Finding No. 1 stated, which Finding No. 1 as made by the court is in words and figures as follows:

"That by the 15th section of the Act of Congress approved March 3, 1891, entitled 'An Act to Repeal the Timber Culture Laws' (26 Stats. L., 1101), and by the Proclamation of the President dated the 28th day of April, 1916, there was reserved from use, occupation, settlement or benefit by any except Metlakahtlans and other Indians, the following lands and waters, to wit: 'The body of lands known as Annette Islands, situate in the Alexander Archipelago, in Southeastern Alaska, on the north side of Dixon's Entrance' and 'the waters within 3000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets' and 'the bays of the said islands, rocks and islets'; and that by said Proclamation warning was 'expressly given to all unauthorized persons not to fish in or use any of said waters.' "

SIXTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 3 and in finding the facts as in said Finding No. 3 stated, which Finding No. 3 as made by the court is in words and figures as follows:

“That prior to the issuance of the Proclamation hereinbefore mentioned, T. A. Heckman, superintendent of the defendant company, stated to P. E. Harris that he knew that a Proclamation in the premises was about to be issued by the Government.”

SEVENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 5 and in finding the facts as in said Finding No. 5 stated, which Finding No. 5 as made by the court is in words and figures as follows:

“That notwithstanding said Act, Proclamation and notice, said defendant did maintain at the time of the filing of this suit, and does now maintain, possession of the area enclosed by said piles and refuses to remove the same, and refuses to vacate the premises, and threatens and is about to and will, if not enjoined, perfect said trap as a fishing device and will catch therein large numbers of valuable fish, and will further trespass upon said land and water so reserved as aforesaid,

to the irreparable injury of plaintiff, both in its sovereign capacity and as owner and proprietor, for which plaintiff would have no plain, speedy or adequate remedy at law."

EIGHTH ERROR ASSIGNED.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 1 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 1, is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 1.

"The Court holds as a matter of law that in the construction of a fish trap off Cedar Point, Annette Island, and the maintenance thereof, the defendants were engaged in the exercise of their common right of fishery, and being so engaged in the exercise of a lawful right they acquired a vested right in said fish trap from which they could not be divested by a subsequent Proclamation of the President or otherwise without compensation."

NINTH ERROR ASSIGNED.

This District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 2 requested by the defend-

ants, which said Defendants' Proposed Conclusion of Law No. 2 is in words and figures as follows:

“Defendants’ Proposed Conclusion of Law
No. 2.

“The Court concludes as a matter of law that the reservation of Annette Island as made by Act of Congress March 3, 1891, reserved the lands to ordinary high water mark only and did not include any of the navigable waters of the United States, and that the Proclamation of the President referred to in the pleadings herein was made without authority of law, in that the power to control and dispose of the territories and other property of the United States is by the constitution vested in Congress.”

TENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 3 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 3 is in words and figures as follows:

“Defendants’ Proposed Conclusion of Law
No. 3.

“From the facts found the Court concludes that the plaintiff is not entitled to the relief demanded or to any relief whatsoever.”

ELEVENTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in concluding as a matter of law and making and entering its Conclusion of Law, which is in words and figures as follows:

"That plaintiff is entitled to an injunction as prayed for in the Complaint."

TWELFTH ERROR ASSIGNED.

That the District Court for the Territory of Alaska, Division Number One, erred in entering its judgment and decree herein, which is in words and figures as follows:

"In the District Court for the District of Alaska, Division No. One, at Juneau.

"United States of America, Plaintiff, vs. Alaska Pacific Fisheries, a corporation, et al., Defendants. No. 1468-A.

INJUNCTION AND FINAL DECREE.

"This cause coming on to be heard heretofore, to wit, on the 15th day of June, 1916, by consent of the parties on the issues raised on the bill, answer and reply and on the motion theretofore filed for an injunction, and the Court having heard the evidence introduced by the respective parties, and the cause having been finally submitted to the Court on the 17th day of June, 1916, and the Court having duly considered the same and heretofore having filed its Opinion herein and having made its Findings of Fact and Conclusions of Law herein, now upon motion of the plaintiff,

"It is hereby ordered and decreed that the Alaska Pacific Fisheries, a corporation, its officers,

agents, employes, and all persons acting by, through or under it or in privity with it, be and they are enjoined and restrained from doing any act or thing whatsoever in driving, constructing or completing any fish trap or structure whatsoever on and at Annette Islands reservation or in the waters appurtenant thereto or surrounding the same and being the waters within 3000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets, all in Southeastern Alaska, and from maintaining or operating any trap or structure for fishing therein, and from fishing there in any manner whatsoever, and particularly from driving, operating, completing or maintaining a fish trap at or near Cedar Point, Annette Island, aforesaid, and from delivering or causing to be delivered any material whatsoever for the construction of fishing traps upon said reserve or in said waters.

"And it is further ordered and decreed that the defendant, the Alaska Pacific Fisheries, be and it is hereby ordered to vacate the lands and waters mentioned in the Proclamation of the President of the United States of April 28, 1916, and to remove therefrom, and to remove any and all structures therefrom heretofore erected therein by it directly or indirectly, and to refrain from in any manner trespassing in and upon said waters and said reserve.

"And it is ordered that plaintiff herein have judgment for its costs and disbursements in this suit; and hereof let execution issue. Defendant is allowed 60 days from this date within which to file proposed Bill of Exceptions.

"Done in open court this 7th day of July, 1916.

"ROBERT W. JENNINGS,
"District Judge."

ARGUMENT.

The first four errors assigned relate to the refusal of the Court to make and adopt the Findings of Fact therein referred to at the request of the appellant. Under the Alaska code the Court is required to make Findings of Fact upon all material matters presented by the pleadings. When the legal propositions presented are discussed, it will be made to appear not only that the facts referred to in each of these proposed Findings of Fact are material to a determination of this cause, but also that in each case the proposed Finding of Fact is in accord with the undisputed testimony given by the witnesses. These first four errors will not therefore be separately discussed. Since this Court can and will go into the record to ascertain what the facts are in relation to matters not covered by the Findings of the trial court, the refusal of the trial court to make findings in any given case may not seriously prejudice the party requesting them, but notwithstanding this the trial court should follow the statute and find all the material facts even where the evidence in relation to these facts is undisputed, especially when expressly requested to do so; since this would save this court and counsel much labor when the case is reviewed on appeal.

The next three errors assigned relate to some of the Findings of Fact made by the Court. Findings of Fact in equity cases are made reviewable by Chapter 35, page 80, of the Acts of the second Territorial

Legislature. But as these three Findings of Fact insofar as they are material are conclusions of law rather than Findings of Fact, and since the legal questions presented are the same as those presented by the remaining errors assigned, it is not necessary that they should be separately discussed.

The remaining five errors assigned relate to the refusal of the Court to adopt as its Conclusions of Law certain legal conclusions requested by the appellant, to the adoption of Conclusions by the Court over the objection of appellant, and the entering of the decree.

The errors thus assigned can most conveniently be presented together. They present four legal propositions for consideration. The first of these relates to the question of whether or not the Act of Congress passed in 1887, was such as to make it unlawful for the appellant to construct the fish trap, the maintenance of which was enjoined. The second proposition relates to the validity of the President's proclamation. The third proposition concerns the question of whether or not the appellant did not, under the circumstances in the case, have a vested right to its fish trap of which it could not be deprived by the President's proclamation. And the fourth proposition relates to the question of whether the appellant was required under the provisions of the "Rivers and Harbors" Act to secure a permit from the Secretary of War to construct its fish trap in order to make its

construction and maintenance lawful. These propositions will be discussed in their order.

I. THE EFFECT OF THE ACT OF CONGRESS OF MAY, 1887.

The language of this Act is as follows:

“That until otherwise provided by law the body of lands known as Annette Islands, situate in Alexander Archipelago, in southeastern Alaska, on the north side of Dixon’s entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions as may be prescribed from time to time by the Secretary of the Interior.”

The Act relates only to “the body of lands known as Annette Islands.” Appellant’s fish trap is constructed in an arm of the ocean, its shoremost portion being 200 feet to the seaward from the line of extreme low tide.

An island is a body of land surrounded by water, and the water by which it is surrounded forms no part of it. Moreover the effect of the Act is by its terms expressly limited to the “lands known as Annette Islands,” precluding the idea that the waters surrounding Annette Islands were to come within its terms. Again, it is a familiar rule of construction that grantees of lands bordering upon navigable

waters take to the line of ordinary high tide only. *Shively v. Bowlby*, 152 U. S., 1. Nor is it material to a consideration of this case whether such grantees take to the line of ordinary high tide or to low water mark, as the appellant's fish trap is situate in deep water 200 feet to the seaward of the line of extreme low tide.

The learned trial Judge, however, expressed the opinion that this Act of Congress set aside not only Annette Island, but also the surrounding waters for the exclusive use of the Metlakahtlans as a private fishery.

In support of this view it is said in the opinion:

"In passing this Act Congress must have known (what everyone else knew), that the Indians of Alaska are fisher-folk and hunters and trappers and largely, if not entirely depend for their livelihood upon the yield of such vocations."

It is then urged that the Indian could not subsist without fish. Because of this it is urged that it was the intention of Congress—not to give the Metlakahtlans a right to use the waters of Alaska in common with other Indians and white persons as a common fishery—but to give them a private right of fishery in the waters surrounding Annette Island from which all other Indians, as well as whites, were to be excluded.

This conclusion of the learned trial Judge is unwarranted. While it is true that Congress, and every-

one else, knew that the Alaska Indians were "fisher-folk," it is equally true that Congress, and everyone else, knew that the waters surrounding Annette Island were not such as were, at the time of the passage of the Act, used by the Indians as a place within which to catch fish; and also that even if such waters were suitable as an Indian fishing ground, it would be a gross injustice to reserve them exclusively for the Metlakahtlans, a foreign tribe of Indians, and prevent the native Alaska Indians, who had always lived in Alaska and who were also "fisher-folk" from fishing therein—to say nothing about the rights of the white fisherman, who were also "fisher-folk," and had as American citizens a common right of fishing in these waters.

Annette Island is surrounded on all sides by the deep waters of the ocean. The fish pass through these waters on their way to the spawning grounds, situate at the head of the streams. These fish may be intercepted and caught by the use of fish traps, but Congress, and everyone else, knew that, at the time of the passage of the Act, these Indian "fisher-folk" knew nothing about the use of a fish trap. Yet without resorting to the use of a fish trap the fish in these waters could not be caught (See evidence Burckhardt, Record, page 116).

At the time of the passage of the Act, and even now, except when employed in connection with the operation of some cannery, the Indian caught and still

catches salmon by primitive methods, such as the gaff and spear. He did not, and does not now except in the cases mentioned, fish in the deep waters of the ocean, or its arms, but in the streams where the salmon can be captured without resorting to the use of appliances other than those in use by the Indian. During the fishing season the Indians leave their villages in the canoes and gather on the banks of the streams. There they catch their fish and dry them; and, the fishing season over, they load their canoes with the dried salmon and return to their respective villages.

Surely Congress did not intend to reserve for the Metlakahtlans a private fishery that would not and could not be of use to them; to so contend would, in the language of the learned trial Judge, be "to say that Congress is engaged in the business of luring the unsuspecting, of cheating and deceiving them."

Moreover the learned trial Judge erred in assuming that the Metlakahtlans required a private fishery either in the water surrounding Annette Island or elsewhere, in order to supply themselves with food. At the time of the passage of this Act there were, and still are, thousands of Alaska Indians residing in Indian villages located here and there in the sheltered nooks both on the mainland and on the islands. These Indians had always supplied themselves with food fish by exercising their common right of fishery. The Metlakahtlans could do likewise, or they could fish in the adjoining British Columbia waters as they had

been accustomed to do. They had therefore at the time of the passage of the Act about as much need for a private fishery as they have for fleas in Italy.

Again the learned trial Judge contended that good faith required the Act to be so construed as to create for the Metlakahtlans this private fishery, for the reason that they were invited to come to Annette Island. But these Indians were not invited to come; they emigrated from British Columbia to Annette Island before Congress took any notice of them. The Act itself refers to them as "Those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska." No invitation was extended to them—they were already there.

There were then, as now, Indian villages on practically every island in Southeastern Alaska as well as on the mainland. To these Indians the Government owed the same duties that it owed to the aboriginal tribes, originally inhabiting other portions of the United States; but it owed no such duties to the Metlakahtlans, for these Indians were not original inhabitants of the United States, but of British Columbia.

The Metlakahtlans invaded our territory and took possession of one of the most beautiful and most favorably situated islands in all Alaska, without our invitation and without our consent. Of such the poet said: "Unbidden guests are welcomest when they are gone." And when it comes to a participation in

the bounty bestowed by our Government upon our own native Indian tribes, they occupy the position of those "Who shove, climb, and intrude into the fold." In that regard they always were and still are "Scramblers at the shearers' feast."

As a matter of sheer generosity, and not because of any duty it owed them, Congress gave the Metlakahtlans the right to occupy Annette Island to the exclusion not only of the whites, but also of the Alaska Indians except only such as were willing to join the Metlakahtlan Tribe. If the question of fishery rights was considered at all it is possible that it was the then intention of Congress that these new-comers should enjoy the common right of fishery in the waters of Alaska along with the Alaska Indians and the whites, but it is more probable that it was the intention of Congress that the Metlakahtlans should continue to fish in the waters of British Columbia as they had been accustomed to do when residing at Old Metlakahtla. These waters lie immediately to the south of Annette Island, and it would work no hardship on the Metlakahtlans to be compelled to catch their fish supply there: That this was the intention of Congress is borne out by subsequent legislation. In the year 1906 Congress passed Section 254 of the Compiled Laws of Alaska, which reads as follows:

"Sec. 254. That it shall be unlawful for any person not a citizen of the United States, or who has declared his intention to become a citizen of the United States, and is not a bona fide resident

therein, or for any company, corporation, or association not organized or authorized to transact business under the laws of the United States or under the laws of any State, Territory, or district thereof, or for any person not a native of Alaska, to catch or kill, or attempt to catch or kill, except with rod, spear, or gaff, any fish of any kind or species whatever, in any of the waters of Alaska under the jurisdiction of the United States."

Under the provision of this Act it is made unlawful for those not citizens to catch fish in the waters of Alaska. An exception is made in favor of such as are natives of Alaska, but no exception is made in favor of the Metlakahtlans, who are natives of British Columbia. In the face of this Act it cannot be contended that it was the intention that the water surrounding Annette Island should be used by the Metlakahtlans exclusively, for Congress would not create a private fishery for the latter and then make it a crime for them to enjoy the private fishery thus created.

Nor did the officers of the Government called on to construe this Act of Congress place on it the construction placed thereon by the learned trial Judge, for, if in their judgment a private fishery already existed under the Act, there would be no occasion for an executive proclamation creating such a fishery. The contention that it was the purpose of the proclamation merely to define the boundaries and extent of the fishery already existing under the Act is not

borne out by the language of the proclamation itself. It provides that "whereas the Secretary of the Interior "is desirous of placing a cannery in operation on "Annette Island it is necessary that the fishery in the "contiguous waters be reserved for the purpose of supplying fish and other aquatic products for this cannery." The proclamation then proceeds to create a private fishery for the use of the Metlakahtlans, not to define a fishery already created.

There is no valid reason why the rule applied in *Shively v. Bowlby*, that the grantee of lands bounded by navigable water takes to the line of ordinary high tide only, should not be applied in this case. The objection that this is not a grant by the Government of the title to the land itself does not go to the substance of the matter. When Congress passed this Act it did two things: It set apart and reserved the land affected from sale, and it gave to the Metlakahtlans a right to hold and use these lands as tenants in common until otherwise provided by law. The language of the Act is "To be held and used by them in common"; that is to say: it created a reservation of public lands and granted to the Metlakahtlans an estate at will in these lands to be held by them as tenants in common. There is no reason why a rule applicable in interpreting and defining a description of lands contained in a grant conveying an estate in fee, should not be applicable in interpreting and defining a description of lands when contained in a

grant of an estate less than an estate in fee such as an estate at will.

The objection made by the learned trial Judge that the Government and the Metlakahtlans were not "Equals dealing at arm's length," presents no reason why the rule should not be applied in this case. The estate granted was a voluntary gift on the part of the Government. The Metlakahtlans parted with nothing. Surely it cannot be said that the courts should apply rules of construction especially designed to prevent the recipient of a gift from being over-reached by the donor. It is a familiar rule that all instruments relating to gifts, with the single exception of wills, are to be strictly construed in favor of the donor and against the donee; and this rule is especially applicable where the Government is the donor, for all instruments to which the Government is a party are on that account also to be strictly construed in favor of the Government. This then presents two additional reasons why this legislative grant of an estate at will should be strictly construed; one is that it relates to a voluntary gift and the other is that the Government is a party to it.

However, whether this Act be strictly construed or liberally construed is immaterial as far as the issues in this case are concerned. By its express terms its operation and effect is limited to "the body of lands known as Annette Island." No mention is made of the surrounding waters, nor are the fisheries in any

manner referred to. No rule of construction however liberal would enable the Courts to read into an act of Congress things to which not even the slightest reference is made. The most liberal effect that could be given to the Act would be to hold that the lands set apart to be held by the Metlakahtlans in common extended to low water mark instead of high water mark. This, however, would not affect appellant's rights as its fish trap is situated wholly in deep water 200 feet to the seaward of the line of extreme low tide.

There is, however, a further reason why this Act cannot be given the construction contended for. It is found in the fact that Congress did not have the power to thus destroy the public right of fishery in the navigable waters of the United States. Nor could it make a grant of the submerged lands or navigable waters surrounding Annette Island that would have that effect. And this would be true of an estate at will, for years, for life, or in fee.

Appellant's fish trap is situate in an arm of the sea many miles in width. The entire trap is situate in deep water, its shoremost point being 200 feet to the seaward of the line of extreme low tide.

A discussion relating to the power of Congress to exclude the people at large from the navigable waters surrounding Annette Island and prevent them from exercising their common right of fishery therein, in order to give the Metlakahtlans the exclusive right to fish in these waters, involves an inquiry into the title

by which the Government holds the navigable waters and into the question of what right or title the Government has, if any, to the fish found therein.

At common law the title to navigable tide waters vested in the King by virtue of his sovereignty. But the right to fish therein belonged to the people of England who had therein a common of piscary. In ancient times the Norman kings, commencing with William the Conqueror, claimed and exercised the right of fencing or otherwise delineating the boundaries of portions of the navigable waters with a view of excluding the public therefrom and giving to some individual or class of individuals the exclusive right to fish therein. But the creation of these exclusive fisheries was deemed a usurpation by the people of England and an invasion of their common right of fishery. Accordingly a provision was inserted in Magna Charta under which the creation of private fisheries was in the future forbidden and in accordance with which King John agreed to annul and lay open all fisheries from which the public had been excluded by him. While the exclusive fisheries created prior to the reign of King John were left unmolested, it was provided that the fisheries not fenced in or shut against the common use in the time of King John should be from thenceforth laid open. And it was similarly provided in the subsequent charter of King Henry III. Since Magna Charta no private or exclusive fisheries have been or could be created in

the realm of England. From that time on it has been held that the King held the navigable waters by virtue of his sovereignty, but that the right to fish therein was a right common to all the people of England. The law upon this question was carefully and ably reviewed by the Supreme Court of New Jersey in the leading case of *Arnold v. Mundy*, 6 N. J. Law, 1, where it was said on page 73 of the opinion:

“An exclusive right of fishing in a navigable river, is said to be a royal franchise, that is, a privilege or branch of the royal prerogative, granted by the king to a private person. This royal prerogative, we are told, was first claimed by the crown, upon the coming in of William the Conqueror, and was considered by the people to be a usurpation of their ancient common rights. Accordingly, in Magna Charta, which is said to be nothing more than a restoration of the ancient common law, we find this usurpation broken down and prohibited in future. That charter, as passed in the time of King John, enacts, ‘that where the banks of rivers had first been defended in his time (that is, when they had first been fenced in, and shut against the common use, in his time), they should be from thenceforth laid open.’ And, by the charter of Henry III, which is but an amplification and confirmation of the former, it is enacted, ‘that no banks shall be defended (that is, shut against the common use) from henceforth, but such as were in defense in the time of King Henry our grandfather, by the same places and the same bounds as they were wont to be in his time.’ By this charter it has been understood, and the words fairly import, that all grants of rivers,

and rights of fishery in rivers or arms of the sea, made by the kings of England before the time of Henry II, were established and confirmed, but that the right of the crown to make such royal grants, and by that means to appropriate to individuals what before was the common right of all, and the means of livelihood for all, for all future time, was wholly taken away. And whatever diversity there may be found in the books, with respect to the different kinds of fishery, it can no way affect the operation of the charter in this respect, because that forbids all manner of fencing in, or shutting, fisheries against the common use. All claim, therefore, of an exclusive right of fishery in a navigable river, founded upon the king's grant or prescription, which presupposes a grant, must reach as far back as Henry II."

With reference to the character of the King's title to the navigable waters, the Court say on page 71:

"Every thing susceptible of property is considered as belonging to the nation that possesses the country, and as forming the entire mass of its wealth. But the nation does not possess all those things in the same manner. By very far the greater part of them are divided among the individuals of the nation, and become private property. Those things not divided among the individuals still belong to the nation, and are called public property. Of these, again, some are reserved for the necessities of the state, and are used for the public benefit, and those are called 'the domain of the crown or of the republic'; others remain common to all the citizens, who take of them and use them, each according to his necessities, and according to the laws which regulate their use, and are called common property. Of this latter kind,

according to the writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish, and the wild beasts. Vattel, lib. i, 20; 2 Black, Com., 14. But inasmuch as the things which constitute this common property are things in which a sort of transient usufructuary possession, only, can be had; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore, the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected, and regulated for the common use and benefit. But still, though this title, strictly speaking, is in the sovereign, yet the use is common to all the people."

And again on page 76 it is said:

"Upon the whole, therefore, I am of opinion, as I was at the trial, that by the law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which

regulate that use; that the property, indeed, strictly speaking, is vested in the sovereign, but it is vested in him not for his own use, but for the use of the citizen, that is, *for his direct and immediate enjoyment.*

"I am of opinion, that this great principle of the common law was, in ancient times, in England gradually encroached upon and broken down; that the powerful barons, in some instances, appropriated to themselves these common rights; that the kings themselves, also, in some instances during the same period, granted them out to their courtiers and favorites; and that these seizures and these royal favors are the ground of all the several fisheries in England, now claimed either by prescription or by grant; that the great charter, as it is commonly called, which was nothing but a restoration of common right, though it did not annul, but confirmed, what had been thus tortiously done, yet restored again the principles of the common law, in this as well as in many other respects; and since that time no king of England has had the power of granting away these common rights, and thereby despoiling the subject of the enjoyment of them."

The Court further held that upon the Revolution the title theretofore held by the King became vested in the State, and that the State through its Legislature might lawfully provide for the erection of wharves, docks and other aids to navigation and might also provide for the clearing and improvement of fishing places in order to increase the product of the fisheries, but with reference to this power of the State it is said: "But still this power, which may be thus exercised

“by the sovereignty of the State, is nothing more than
 “what is called the *jus regium*, the right of regulat-
 “ing, improving, and securing for the common benefit
 “of every individual citizen.”

Not only has the case of *Arnold v. Mundy* become a leading case in this country, but it has been at least twice referred to by the Supreme Court of the United States in the highest terms of approval. In the case of *Martin v. Wadell*, 16 Peters, 345, Chief Justice Taney, speaking for the Supreme Court of the United States, lends approval to the conclusions arrived at by the Supreme Court of New Jersey, and while an express decision upon the points involved in *Arnold v. Mundy* was not necessary in that case, the Chief Justice in referring to the opinion of the Supreme Court of New Jersey said that it was entitled to great weight, and that if the words of the Letters Patent under consideration in *Martin v. Wadell* had been more doubtful so as to require the application of the law laid down in *Arnold v. Mundy* to the decision, the Chief Justice says: “this decision, made
 “upon such a question, with great deliberation and
 “research, ought, in our judgment, to be regarded as
 “conclusive.”

Again in the case of *Illinois Central Railroad Company v. Illinois*, 146 U. S., 387, Mr. Justice Field refers approvingly to the statement of Chief Justice Taney that the decision in *Arnold v. Mundy* was entitled to great weight and was made with great

deliberation and research. And after observing that it was there held that the power exercised by the State of the lands and waters was nothing more than what was called the *Jus Regium*, the right of regulating, improving and securing them for the benefit of every individual citizen, he quotes other portions of the opinion in support of matters then under discussion.

In the case of the *Illinois Central Railway Company v. Illinois* one of the questions before the Court related to the validity of a grant made by the State to the railroad company of the submerged lands lying in front of the Chicago harbor. The Supreme Court adopted the conclusions reached by the New Jersey Court in the case of *Arnold v. Mundy* and held that the State of Illinois held the title to the navigable waters and the underlying submerged lands by virtue of its sovereignty, but that this was not an absolute title such as that by which the United States holds the public land intended for preemption and sale, but that the State held this title in trust, merely, for the use of the whole people who had in such waters the common right of fishery and that of navigation, and that the State could not substantially impair these rights, but was required by virtue of this trusteeship to so hold these waters and their underlying beds as to preserve to the whole people these public rights. It was held that the State might, as was also held by this Court in the case of *Mission*

Rock Co. v. United States, 109 F., 763, authorize the construction of wharves and piers in aid of navigation or dry docks and other like structures and make grants of small parcels of the submerged lands therefor, provided, that such grants did not substantially impair the rights of the public.

If the State were therefore to reserve or set aside its navigable waters for the use of a particular class such as the Metlakahtlans and exclude the public therefrom, its conduct in this regard would not be consistent with the exercise of that trust, which, as was said by the Supreme Court in *Illinois Central Railroad Company v. Illinois*, "requires the government of the State to preserve such waters for the use of the public."

This same doctrine was also declared by the Supreme Court of Wisconsin in the case of *Penauckee v. Savoy*, 74 Am. St. Rep., 859. It was there held that it was the duty of the State to preserve forever the common rights of navigation and fishery, and that the trusteeship of the State in connection with its title to the navigable waters was inviolable. The Court say:

"It is the settled law that submerged lands of lakes within the boundaries of the State belong to the State in trust for public use, substantially the same as submerged lands under navigable waters at common law. Upon the admission of the State into the Union the title to such lands, by operation of law, vested in it *in trust to preserve to the people of the State forever* the common rights of

fishery and navigation and such other rights as are incident to public waters at common law, which *trusteeship is inviolable, the State being powerless to change the situation* by in any way abdicating its trust."

If then the State cannot "substantially impair" the public right of fishery and navigation and is bound to preserve the public waters so that the people may be able to exercise these rights forever, it necessarily follows that the State could not set aside and reserve the navigable waters for the use of the Metlakahtlans and forbid the people to exercise therein their common right of fishery. By so doing the State would not only "substantially impair" but it would destroy and do away with that right altogether. It is not and cannot be material whether the public right of fishery is "substantially impaired" by granting the navigable waters or their bed to a railroad company, as had been done in the case of *Illinois Central Railroad Co. v. Illinois*, or by setting aside the navigable waters for the Metlakahtlans and excluding the public therefrom. The mischief does not lie in "substantially impairing" the public right of fishery in this or that manner, but the mischief lies in "substantially impairing" that right at all. The object of the law is not to protect the title of the State to the navigable waters but to protect the common rights of the people therein. If these public rights are invaded or "substantially impaired" the mischief is accomplished, and it is immaterial what means are employed to

bring this about. The obligation imposed upon the State as trustee would not be satisfied if the State were to hold the title to the navigable waters for the use of the Metlakahtlans for, in the language of the Supreme Court of the United States, the trust "requires the Government of the State to preserve such waters for the use of the public" and, in the language of the Supreme Court of Wisconsin, the title is vested in the State in trust "to preserve to the people of the State forever the common rights of fishery and navigation." The trusteeship is inviolable. The State cannot substitute one beneficiary for another. The people, that is to say the public, are the beneficiaries of the trust and it is the duty of the State to so discharge its duties as trustee that they—the public—can at all times and forever exercise their common rights of fishery and of navigation.

So also in the Territories, where the title to the navigable waters and their beds is held by the Federal Government in trust for the future State, the right of the whole people to exercise in such waters the common rights of fishery and of navigation exists as fully as it does in the States. These rights of the public are not affected by the question of whether the sovereignty vests in the State or in the General Government. They spring from and find their origin in the common law and exist regardless of whether the title is held by one sovereign or another. In either case the holding of the title is a governmental func-

tion, it is held by the sovereign not as a holder of private lands, but as a sovereign in trust for the whole people who have therein the common rights of fishery and of navigation.

In the case of *Shively v. Bowlby*, 152 U. S., 1, the extent of the power of Congress in relation to the navigable waters as well as the existence of the public right of fishery and navigation therein was authoritatively settled by the Supreme Court. In this case it was said: "Notwithstanding the dicta contained in "some of the opinions of this Court, already quoted, "to the effect that Congress has no power to grant "any land below high water mark of navigable "waters in a territory of the United States, it is evident that this is not strictly true"; and the Court after laying down the rule that in the Territories Congress exercises all the powers of government both Federal and State, proceed to enumerate the exceptions to the rule that Congress cannot make grants of lands below high water mark in the Territories in the following language: "We cannot doubt, therefore, that Congress has the power to make grants "of lands below high water mark of navigable waters "in any territory of the United States, whenever it "becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations, and among "the several States, or to carry out other public pur-

“poses appropriate to the object for which the United States hold the territory.”

Clearly a grant of the navigable waters surrounding Annette Island or a grant of an estate therein to the Metlakahtlans would not come within any of the exceptions here enumerated:

The first exception relates to those cases where it becomes necessary to grant submerged lands in order to carry out international obligations; as when grants to such lands were made by a foreign sovereign having a right under the laws of such foreign sovereignty to make such grants, prior to the acquisition of the Territory by the United States. In relation to a grant of this character made by Mexico prior to the treaty of cession the Supreme Court say: “That doctrine” (referring to the doctrine that the submerged lands are held in trust for the future State), “cannot apply to such lands as had been previously granted to other parties by the former Government”: *Knight v. Association*, 12 Sup. Ct. Rep., 258. So also fishery rights granted by the King of Hawaii, under laws permitting such grants, were recognized and protected after the cession of the Territory to the United States. But no question of this character can of course arise in connection with our dealings with the Metlakahtlans, whose rights, if any they have, were initiated long after Alaska became American territory.

The second exception arises out of the constitutional right of Congress to regulate commerce. This right

exists, of course, both before and after the admission of the State. But this matter does not enter into our dealings with the Metlakahtlans.

The third exception relates to those cases in which it becomes necessary to grant submerged lands in order to "carry out other public purposes appropriate to the objects for which the United States hold the territory." In order to determine the scope of this exception it becomes necessary to inquire what the objects are for which the United States hold the territory. This inquiry is fully answered by the Supreme Court. After making the statement that the reasons why Congress never disposed of these lands under general laws are not far to seek, the Court proceeds to point out those reasons. The authorities, both English and American, are reviewed to show that the people have a common right of fishery and navigation in the navigable waters. The Court then proceeds to point out that in the Territories the Government holds the title burdened with a still further trust, in that the title is also held in trust for the future State. After so reviewing the law the Supreme Court say:

"And the territories acquired from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States upon an equal footing in all respects; and the title and dominion of the tide waters, and the lands under them, *are held by the*

United States for the benefit of the whole people, and, as this Court has often said, in the cases above cited, "in trust for the future States."

The objects, therefor, for which the United States hold the title to the navigable waters in the Territories are to insure to the whole people the rights of fishery and navigation in such waters, and to insure the transmission of the title so held to the future State when created. The rights of the people to a common right of fishery and of navigation are not affected by the question of whether the title vests in the General Government or in a State. These rights exist in either case. The only difference being that in the case of the General Government the title is burdened with an additional trust, requiring it to transmit the title, held by it as a sovereign to be transmitted to the future State, as soon as the future State acquires capacity to receive and hold it as a sovereign.

In the case of the *Illinois Cent. R. Co. v. Illinois*, it was held that the only grants of submerged lands that were appropriated to the objects for which the title was held by the State of Illinois, which objects were said to be to secure the public rights of fishery and navigation, were grants of such small areas as might serve for foundations of wharves, docks and other structures that would serve as aids to navigation; and in this connection it was further held that the public rights of fishery and navigation could not be "substantially impaired." The title and right of the

General Government, and of the State of Illinois being in this regard the same Congress could make no grant that the State of Illinois could not make except as has been pointed out to carry out international obligations. It follows that Congress could make no grant to the Metlakahtlans of an estate either in fee, for life, for years or at will in the waters surrounding Annette Island, for such a grant would not only "substantially impair," but entirely destroy the public right of fishery therein. And as was said when the case of *Ill. Cent. R. Co. v. Ill.* was considered, if a grant cannot be made because it "substantially impairs" the public right of fishery, it follows that a reservation which has precisely the same effect cannot be made.

The mischief does not lie in the making of the grant, but in the effect thereof, that is to say: The impairment of the public rights. What is true of the grant in this respect is true of the reservation. In either case the grant or the reservation do no more than to serve as the means by which the forbidden mischief is accomplished. Indeed, if Congress intended to reserve for the exclusive use of the Metlakahtlans as a private fishery the waters surrounding Annette Island, the very object of the reservation was the destruction of the public right. The underlying reason why Congress can neither grant nor reserve a fishery to or for the Metlakahtlans, or any other individual or class, is found in the fact that the fishery

effected by the grant or reservation does not belong to the Government, but to the people in common.

The precise question of whether Congress could grant or set aside the bed of a navigable stream in a Territory as part of an Indian reservation was passed upon in the recent case of *United States v. Mackey*, 214 Fed., 146. In that case it was contended by the Government that the ownership of the bed of the Arkansas River passed to the Creek nation by a General Grant of lands made to it in the patent executed by the Government to the Creek nation, while Oklahoma was a Territory, conveying to that nation all the tribal lands, which the Creeks have since occupied in what is now Eastern Oklahoma, the Arkansas River having been included within the boundaries of the grant. But Judge Campbell held that the Court would take judicial notice of the fact that the Arkansas River was a navigable stream and that being such Congress had no power to grant it to the Creek nation as part of a grant of lands made to furnish the Creeks with a home in the then far west. It was held that this grant did not come within any of the exceptions pointed out in *Shively v. Bowlby* to the general rule that Congress had no power to grant submerged lands underlying navigable waters in the Territories. The objects of this grant were thus stated by the Court:

“It is familiar history that the purpose of this grant to the Creeks was to provide them a country

west of the Mississippi to be taken and occupied by them in lieu of the lands formerly occupied by them, which they could no longer occupy in peace because of the encroachments of white settlers, and the friction incident thereto. It was to provide a home for this tribe in the then far west."

Judge Campbell then holds that a grant of the bed of the Arkansas River for this purpose, was not performing an international obligation and was not to affect the improvement of such lands for the promotion or convenience of commerce, and was not to carry out any other public purpose appropriate to the objects for which the United States held the Territory.

This case and the case at bar are identical in principle. In this case the reservation was created to furnish a home for the Creeks; in the case at bar a reservation was created to furnish a home for the Metlakahtlans. In this case the reservation was created by grant; in the case at bar by reserving and setting aside the lands embraced within the reservation. But as has already been pointed out one method of creating the reservation, when applied to navigable waters, is as effective as the other in destroying the public right of fishery in such waters.

The case was reversed on appeal on the ground that the Court erred in taking judicial notice of the fact that the Arkansas River was navigable at the point in question. The Circuit Court of Appeals, therefore, approved of the law as laid down by Judge Campbell

with reference to the inability of Congress to convey navigable waters for the purpose of an Indian reservation. Had the Circuit Court of Appeals not taken the same view of this matter that Judge Campbell did the case would not have been reversed on the ground that the Court erred in taking judicial knowledge of the fact that the Arkansas was navigable, for that fact would have been immaterial, but on the ground that the bed of the river passed as a part of the grant without reference to its navigability.

See also in the case of *Illinois Steel Co. v. Bilot*, 83 Am. St. Rep., 909. The Supreme Court of Wisconsin say:

“The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high water mark, within the boundaries of the State, because vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds and rivers, to the same extent that the public are entitled to enjoy tidal water at the common law. *A patent from the United States, so far as it purports to convey any of such lands, whether made before the State was admitted into the Union or thereafter, is ineffectual.*”

While the rule thus stated is, of course, subject to the exceptions noted in *Shively v. Bowlby*, and *Ill. Cent. R. Co. v. Illinois*, the opinion points out with clearness the reason for the general rule. In this

regard the opinion is in harmony with the opinions expressed by the Supreme Court in the cases mentioned.

In view of the fact that the Supreme Court has passed upon the matter under consideration, it can serve no useful purpose to further review the decision of the State Courts. It is established law, according to the opinion in *Illinois Cent. R. Co. v. Illinois* that the people have in the navigable waters a common right of fishery and navigation which cannot be "substantially impaired" and that it is the duty of the State to preserve these rights for the enjoyment of the people. And it is established by the decision in *Shively v. Bowlby* that the people have the same rights in this regard in the Territories that they have in the States. Nor could it be otherwise. These public rights spring from the common law and accordingly as soon as the territory is brought subject to the common law whether by treaty of cession or otherwise these rights arise. And since Congress cannot create a reservation of navigable waters with a view of giving the Metlakahtlans an exclusive right to fish therein without destroying the public right of fishery in such waters, it follows that Congress has not the power to create such a reservation.

II. PROCLAMATION OF THE PRESIDENT.

The proclamation reads as follows:

"Whereas, it is provided by Section fifteen, of the Act of Congress, approved March third, eight-

een hundred and ninety-one, entitled, 'An Act to Repeal Timber-Culture Laws, and For Other Purposes,' that 'Until otherwise provided by law, the body of lands known as Annette Island, situated in the Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's Entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtlan Indians, and those people known as the Metlakahtlans, who have recently emigrated from British Columbia, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior'; and

"Whereas, the Secretary of the Interior, with a view to assisting the Metlakahtlans to self-support, has decided to place in operation a cannery on Annette Island; and

"Whereas, it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery;

"Now, therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the power in me vested by the laws of the United States of America, do hereby make known and proclaim that the waters within three thousand feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island, and the adjacent rocks and islets, located within the area segregated by the broken line upon the diagram hereto attached and made a part of this proclamation, also the bays of the said islands, rocks and islets, are hereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined them or may join

them in residence on these islands, to be used by them under the fisheries laws and regulations of the United States as administered by the Secretary of Commerce.

"Warning is hereby expressly given to all unauthorized persons not to fish in or use any of the waters herein described or mentioned.

"In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

"Done at the City of Washington this 28th day of April, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and fortieth."

In determining the validity and effect of the foregoing proclamation it becomes necessary to inquire into its character and purpose.

After reciting the act of Congress setting apart Annette Island for the use of the Metlakahtlans, the preamble makes the statement that the Secretary of the Interior is desirous of placing a cannery in operation on the island and that it is therefore necessary that the fishery in the contiguous waters be reserved for the purpose of supplying fish and other aquatic products for this cannery. The proclamation then proceeds, "Now, therefore" (that is to say for the reasons stated), "I, Woodrow Wilson, etc., do hereby
 "make known and proclaim that the waters within
 "three thousand feet from the shore at mean low
 "tide of Annette Island, etc., are hereby reserved for
 "the benefit of the Metlakahtlans and such other
 "Alaska natives as have joined them or may join them

“as residents of these islands, to be used by them
 “under the fisheries laws and regulations of the
 “United States as administered by the Secretary of
 “Commerce. Warning is hereby expressly given to
 “all unauthorized persons not to fish in or use any
 “of the waters herein described or mentioned.” The
 effect of the proclamation then, if valid, is simply
 to create an exclusive fishery in the waters mentioned
 for the benefit of the Metlakahtlans. The reason assigned
 for this action is that it was deemed necessary
 to create this exclusive fishery in order to supply fish
 for the Metlakahtla cannery.

While the reason assigned loses all its force in
 view of the fact that the Metlakahtlan Indians operated
 this cannery for many years without the enjoyment
 of an exclusive fishery, and would be operating
 it now were it not for the indiscreet action on the
 part of the Board of Education, and in view of the
 further fact that the cannery itself is no longer in
 the control of the Metlakahtlans, but has been leased
 to a white man, it clearly indicates that the object
 of the proclamation was to create a private fishery,
 and the further statement in the proclamation that
 the waters mentioned are reserved for the benefit of
 the Metlakahtlans, etc., to be used by them under
 the fisheries laws and regulations of the United States,
 and the warning given to others not to fish in any of
 those waters, clearly indicates that the proclamation
 can have no other effect.

It is contended that the President has no power, by executive proclamation or otherwise, to exclude the public from the navigable tide waters of the United States and prevent the people from exercising therein their common right of fishery, in order that the Metlakahtlans or any other person or class of persons may have an exclusive right to fish therein. If as has been seen, Congress would have no power to take such action it would follow that the President could not do so. But even if it were conceded that Congress had this power, it would not follow that like power was also possessed by the President.

The Constitution provides as follows: "The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States." Under this provision Congress has power to exercise in the Territories all the functions of Government both State and Federal (*Shively v. Bowlby*). Provided that the power so exercised must be exercised subject to the provisions of the Constitution (*Rasmussen v. United States*). But the Constitution places this power in the hands of Congress, so that its exercise becomes a legislative function. Nowhere is similar power conferred upon the President.

Where power is expressly conferred upon Congress it cannot be otherwise than that Congress is the only department of the Government authorized to exer-

cise it. Clearly the framers of the Constitution would not expressly confer power on Congress, if it were their intention that such power should be exercised by Congress not only but by the executive as well. Moreover, the Constitution confers all legislative powers on Congress, making Congress the legislative department of the Government, so that when power is expressly conferred upon Congress, the exercise of such power becomes a legislative function. The exercise of such power is therefore by express action withheld from the executive, who can under the Constitution perform no legislative functions.

While admitting that the Constitution confers no express power on the executive, in this behalf, the learned trial Judge contends that the executive has the implied power to forbid the exercise by the people of their common right of fishery in the navigable waters in order that the Metlakahtlans may have the exclusive right to fish therein. The case of *In re Neagle*, 135 U. S., 64, is relied upon to support this contention. In that case it was held that since the Constitution provided that the executive "shall take care that the laws be faithfully executed" he had power to direct a Deputy United States Marshal to protect Justice Field against threatened bodily injury while Justice Field was engaged in the discharge of his duties. It was held that it was the duty of Justice Field to enforce the laws, and the duty of the executive branch to see that this was done and accordingly

that if Justice Field was threatened with bodily harm while engaged in the performance of this duty it became the duty of the executive to furnish him the necessary protection. It requires no discussion to show that there is nothing in this case that would authorize the executive to create a private fishery for the benefit of a British Columbia tribe of Indians.

"The Government of the United States," says Judge Cooley, "is one of enumerated powers; the National Constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess" (*Cooley Con. Lim.*, 11). So also it was said by Chief Justice Marshall in *Martin v. Hunters Lessees*, 1 Wheat., 564. "The Government, then, of the United States, can claim no powers which are not granted to it by the Constitution." Again the ninth Amendment provides: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." And the tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the State are reserved to the States respectively, or to the people." What is true with reference to powers conferred upon the Government by the Constitution must of course be true of the powers conferred upon each of the departments of the Government by that instrument. If the Government itself has no powers

except such as are conferred by the Constitution, it follows that none of the departments of the Government can have powers unless so conferred.

It is true that the powers granted are not limited to those expressly enumerated but include those that are conferred by necessary implication. No powers pass by implication however except those that are necessary to carry the powers expressly granted into effect. It will scarcely be contended that it is necessary that the President should have the power to create private fisheries in the navigable waters in order to carry into effect any of the powers expressly conferred on the executive by the Constitution.

But even though our Government were not one of enumerated powers, even though the executive possessed all the powers belonging to an executive at common law, and it will not be contended that the executive could possess powers not possessed by the executive at common law unless such additional powers were conferred in unmistakable terms by the Constitution, which is surely not the case with reference to the matter under discussion, the executive would not have the power to create a private fishery in the navigable waters, for the reason that at common law the executive possessed no such power.

As has already been pointed out, in ancient times the King of England exercised this power, but the people of England regarded this as a usurpation and an invasion of their rights. Indeed, they regarded

the common right of fishery as a right so valuable and sacred that its violation was provided against by an express provision in Magna Charta.

Since Magna Charta no exclusive fisheries have been created in England and it is settled law that the King has since that time had no power to create them (*Arnold v. Mundy*). In this connection it must be remembered that the inhibition contained in the great Charter is against any interference with the public right, that is to say, the common right of fishery which each individual citizen has a right to enjoy. Any interference, whether by grant, a reservation for the use of Indians, or otherwise, is prohibited. As was said by the Court in *Arnold v. Mundy*: "And "whatever diversity there may be found in the books, "with respect to the different kinds of fishery, it can "no way affect the operation of the Charter in this "respect, because that forbids all manner of fencing "in, or shutting, fisheries against the common use."

It is further urged that since it has been held that the President has power to set aside by proclamation portions of the public lands for use as Indian reservations it follows that he had the right to make the proclamation under discussion with a view of setting aside the navigable waters surrounding Annette Island in order to give to Indians the exclusive right to fish therein. In the first place the navigable waters cannot serve the purposes of an Indian reservation, which is a place where the Indians are confined and from

which others are excluded. The Metlakahtlans are not amphibious. The object of the proclamation was not to furnish the Metlakahtlans with a place to live; they had that already. Annette Island was set aside by Congress for that purpose. The object was to deprive the public of their common right of fishery in the waters effected, and to give to the Metlakahtlans the exclusive right to fish therein. Its object was to create a private fishery for the use of an Indian tribe. This is quite a different thing from setting aside a portion of the public lands as an Indian reservation.

The public lands of the United States are the property of the United States. With these the Government can do as it pleases, for in them no one other than the Government has any interest. Anyone going upon the public lands without express authority from the Government becomes a naked trespasser, who may be ejected at will. There may be no special objection to having portions of these lands set aside by the President for this or that public use. Such action may serve a useful purpose and it cannot injure anyone for no one is deprived of any rights that he had before the action was taken.

Not so when the navigable waters are set aside for the exclusive use of some person or class of persons. The navigable waters are not the sole and absolute property of the United States as are the public lands. By virtue of sovereignty the United States hold the title to the navigable waters, but this title is burdened

with a trust in favor of the people. Each individual citizen has in these waters a common right of fishery and navigation, and as was held in the case of *Ill. Cent. R. Co. v. Ill.*, it is the duty of the sovereign, holding the title, to preserve these waters so that these rights of the people may be enjoyed. That an executive proclamation which does away with these rights of the public altogether and forbids their enjoyment is not consistent with the trusteeship under which the title is held, is so very evident as to require no discussion. And that such a proclamation differs widely from a proclamation which violates the rights of no one is equally evident. Clearly the right to issue the latter cannot serve as a basis for the right to issue the former. In one case the Government deals with that which is its own—the public lands; in the other it deals with that which is not its own—the right of fishery, which is the common property of each and all citizens alike. This distinction was clearly drawn by the Supreme Court in the case of *Ill. Cent. R. Co. v. Ill.*, where in speaking of the title by which the State holds navigable waters it was said, “But it is
 “ a title different in character from that which the
 “ State holds in lands intended for sale. It is differ-
 “ ent from the title which the United States hold in
 “ the public lands which are open to pre-emption
 “ and sale.” And again in the same case, with reference to submerged lands, it was said: “The trust
 “ with which they are held therefore is Governmental,

“and cannot be alienated, except in those instances
 “mentioned, of parcels used in the improvement of
 “the interests thus held, or when parcels can be dis-
 “posed of without detriment to the public interests
 “in the lands and waters remaining. This follows
 “necessarily from the public character of the property
 “*being held by the whole people for purposes in*
 “*which the whole people are interested.*”

And again in quoting with approval the language used by Justice Bradley, in a case where the title by which the State held that the State house and that by which it held navigable waters was compared, it is said:

“The cases are clearly not parallel. The character of the title or ownership by which the State holds the State house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightfully states that prior to the Revolution the shores and lands under water of the navigable streams and waters of the Province of New Jersey belonged to the King of Great Britain, as part of the *jura regalia* of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the State as they were by the king, in trust for the public use of navigation and fishery, and the erection thereon of whaves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust they were *publici juris*; in other words, *they were held for the use of the people at large.*”

So also in the case of *Arnold v. Mundy*, 6 N. J. Law, 1, it was there said by the Supreme Court of New Jersey:

“Nothing can be more clear, therefore, than that part of the property of a nation which has not been divided among the individuals, and which Vattel calls, public property, is divided into two kinds, one destined for the use of the nation in its aggregate national capacity, being a source of the public revenue, to defray the public expense, called the domain of the crown, and the other destined for the common use and immediate enjoyment of every individual citizen, according to his necessity, being the immediate gift of nature to all men, and, therefore, called the common property. The title of both these, for the greater order, and, perhaps, of necessity, is placed in the hands of the sovereign power, but it is placed there for different purposes. The citizen cannot enter upon the domain of the crown and apply it, or any part of it, to his immediate use. He cannot go into the King’s forests and fell and carry away the trees, though it is the public property; it is placed in the hands of the King for a different purpose, it is the domain of the crown, a source of revenue; so neither can the King intrude upon the common property, thus understood, and appropriate it to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power; and that, in theory at least, could not exist in a free government, such as England has always claimed to be.”

And again with reference to the power exercised by the State in authorizing the construction of aids to navigation and in regulating the fisheries, it is said:

“But still this power, which may be thus exercised by the sovereignty of the State, is nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen.”

Again in the more recent case of *Ill. Cent. R. Co. v. Chicago*, 176 U. S., 646, it was said:

“The State holds the title to the lands covered by the waters of Lake Michigan lying within its boundaries, but it holds the title in trust for the people for the purpose of navigation and fishery. The State has no power to barter and sell the lands as the United States sells its public lands, but the State holds the title in trust in its sovereign capacity and for the people of the entire State.”

A discussion of the difference between an executive proclamation setting aside a portion of the public lands as an Indian reservation and an executive proclamation prohibiting the people at large from exercising their common right of fishery in the navigable waters in order that a designated class of Indians may have the exclusive right to fish therein, discloses the reasons that exist, independent of Constitutional objections, why the latter can have no legal effect.

The fisheries in the navigable waters do not belong to the Government but to the people at large: The Government has no interest therein which it can set

aside or reserve for the use of any individual or class of individuals. The Government holds the title, it is true, but it holds this title in trust for the whole people who have in the navigable waters affected the common right of fishery and navigation. Any action on the part of the Government which prevents the whole people from enjoying either the common right of fishery or that of navigation is inconsistent with the exercise of that trust, which, in the language of the Court in *Ill. Cent. R. Co. v. Illinois*, "requires the Government of the State to *preserve* such waters for the use of the public." The language of the Supreme Court is clear and explicit, under it the duty of the Government is not fulfilled if it preserves the waters for the Metlakahtlans or for any other special class, but it must preserve them "for the use of the public. Any act of legislation, or executive proclamation, therefor, that has the effect of excluding the public from the use of navigable waters is a clear violation of the trust.

Again, with special reference to the validity of the proclamation as distinguished from an act of Congress upon the subject, the title of the Government is such that in no event can it be the subject of executive action. According to *Arnold v. Mundy*, the Government has in the navigable waters only the *jus regium*, the right of regulating, improving and securing them for the benefit of every individual citizen. And this doctrine was restated with approval by the

Supreme Court in *Ill. Cent. R. Co. v. Illinois*. The only right that the Government has, therefor, in the fisheries found in navigable waters is the right to regulate them for the common good of the whole people. Such regulation is an exercise of the police power, which requires legislative action and can in no case be the subject of an executive proclamation.

The learned trial Judge also refers to the case of *Russian American Company v. United States* as authority for the decision rendered. But in that case the questions now before the Court were not even hinted at. The Packing Company had taken possession of 159.52 acres of land on Afognak Island and had erected buildings thereon. All this was done without authority or license from the United States. Subsequently the whole island was reserved as a fish culture station by an executive proclamation, made pursuant to an express act of Congress. After removing from the island the Packing Company brought suit in the Court of Claims to recover the value of the improvements made by it. The Packing Company was of course a naked trespasser and the Court held that it could not recover. The Court say:

“But if there were any doubt regarding the rights of the petitioner in connection with the above case, they are completely resolved by the language of Sec. 14 of the act, which declares that the provisions of the preceding sections shall not be so construed as to warrant the sales of any lands belonging to the United States which shall be re-

served for public purposes, or selected by the Commissioner of Fish and Fisheries on the islands of Kadiak and Afognak, for the purposes of establishing a fish-culture station. As the President exercised the rights thus reserved, and declared the whole island appropriated for the purpose of establishing a fish-culture station, and warned all persons to depart therefrom, it is clear that the rights, if any, previously acquired by the settlement, were terminated by the proclamation. Petitioner gained no additional consideration from the improvements put upon the land, since, if for no other reason, these were made prior to the act of 1891, when it was a mere trespasser, and occupying the land without a shadow of title."

It will be seen that in that case no question arose with reference to the right to set aside the navigable waters for any purpose. The improvements made and for the value of which suit was brought were situated upon the land and the land was public land in which no one except the Government had an interest. However, if Congress had set aside a portion of the navigable waters for use in connection with a fish-culture station the question presented would be a very different one from that presented in the case at bar. The maintenance of a fish-culture station would promote the interest of the public fisheries. Such action would not impair the public right but would make it more valuable. But a further discussion of that question would be purely academic as it did not arise in this case.

The only case, so far as can be learned, in which

the validity of an executive proclamation reserving a portion of the navigable waters was ever passed upon is the case of *United States v. Ashton*, 170 Fed., 509. In that case President Pierce had set aside an Indian reservation so as to include within its boundaries navigable waters, and it seems that President Grant subsequently extended the reservation with like effect. The case was tried before Judge Hanford, who held that the President cannot by executive proclamation include lands below high water mark within an Indian reservation. In the course of the opinion Judge Hanford says, on page 512:

"The Oregon country was acquired by the United States, with the object in view of creating new States to be admitted into the Union upon an equality with the original States, and, until the States now existing within that country were organized and admitted into the Union, the National Government held the title to the shores and beds of navigable waters therein, as trustee for the future States. *Pollard v. Hagan*, 3 How., 212, 11 L. Ed., 565. If there is any exception to this general rule, it must rest upon a special grant expressly authorized by a law enacted by Congress to provide for some peculiar requirement of the National Government. *Shively v. Bowlby*, 152 U. S. 1, 14 Sup. Ct., 548, 38 L. Ed., 331."

And again on page 517 it is said:

"Any disposition of proprietary rights in the seashore by the Government of the United States, being obnoxious to the firmly established principle that control of the seacoast is an attribute of sov-

ereignty appertaining to the States, could only be valid, if valid at all, by virtue of the exercise of the power vested in Congress to be exercised for the national welfare, and there is no pretext set forth in the bill of complaint or stated in the argument of the complainants' solicitors that any proprietary right to shore lands became vested in the Puyallup Tribe as a community by virtue of any provision, expressed or implied, of any act of Congress whatever. The treaty of 1854 was not in any sense a conveyance of title to any of the lands in controversy to the Puyallup Indians; on the contrary, the treaty was relinquishment by said Indians of whatever rights to these lands may have been theretofore claimed by them. For the reasons already stated, the President could not grant shore lands by the making of an executive order designating the tract of land to be held as a reservation."

There is, however, one further objection to the validity of the proclamation setting aside the waters surrounding Annette Island for the use of the Metlakatls.

Congress in order to preserve the Alaska fisheries for the use of our own people passed an act prohibiting aliens from fishing in the waters of Alaska. Section 254 of the Compiled Laws reads as follows:

"That it shall be unlawful for any person not a citizen of the United States, or who has declared his intention to become a citizen of the United States, and is not a bona fide resident therein, or for any company, corporation, or association not organized or authorized to transact business under the laws of the United States or under the laws of any State, Territory or district thereof, or for

any person not a native of Alaska, to catch or kill, or attempt to catch or kill, except with rod, spear, or gaff, any fish of any kind or species whatsoever in any of the waters of Alaska under the jurisdiction of the United States."

Under the provisions of this section aliens are prohibited from fishing in the waters of Alaska, and the Metlakahtlans, being natives of British Columbia, are, of course, aliens (see Act of Congress relating to Annette Island reservation above quoted. See *ev. Hanford, Rec.*, page 171 *et seq.*). An exception is made in favor of the natives of Alaska. But the Metlakahtlans being natives of British Columbia do not come within the exception. While fishing with rod, gaff and spear is not prohibited, the waters surrounding Annette Island are deep waters, not adapted to that kind of fishing (see map of Annette Island, *Rec.*, page 178; evidence Burckhardt, *Rec.*, page 116).

Here then we have a proclamation setting aside a private fishery for the use of a tribe of British Columbia Indians, who cannot make use of the fishery so set aside for them without committing an offense against the United States. And while the proclamation and Act of Congress refer to other natives who may associate themselves with the Metlakahtlans the evidence is that the population is still composed of Metlakahtlans (see affidavit Reagan, *Rec.*, 74).

It will not be contended that the President can by proclamation set aside an Act of Congress; nor will it

be contended that he can in this manner make that lawful which an express act of Congress makes unlawful. This being true a proclamation having this effect is necessarily inoperative. If the object for which the proclamation was issued is such that it cannot be accomplished, it must follow that the proclamation becomes ineffectual. No one would contend that the public should be prevented from exercising their common right of fishery for no purpose whatever. It is undoubtedly true that the attention of the President was not directed to this section, and equally true that the heads of the Bureau of Education having this matter in charge overlooked this section, but this cannot alter the situation. The Act of Congress was on the statute books and it must be given effect in determining the validity of the proclamation.

III. VESTED RIGHTS.

Should it be conceded, however, that the President could by executive proclamation create a private fishery for the benefit of the Metlakahtlans, it does not follow that the Alaska Pacific Fisheries should be enjoined from maintaining their fish trap driven and constructed in the navigable waters of the United States within the area set apart as a private fishery, prior to the time that the President's proclamation was issued.

The record shows that the officers and agents of the Alaska Pacific Fisheries made observations in the

Spring of 1915 with a view of ascertaining the course followed by the incoming schools of salmon, in order to determine whether the present site of the appellant's fish trap would be valuable for the location of such a trap. These observations covered a considerable period of time and in the month of August, 1915, it having been determined that the site would be a favorable one for a fish trap, a diver was employed with a view of examining the bed of the ocean at that point so as to determine the further question of whether it would be feasible and practical to drive a trap there (see evidence, Burckhardt, Rec., page 86). After so determining that the bed of the ocean was such that a trap could there be driven, arrangements were made to procure the necessary piles and the cannery at Chomly was enlarged by constructing new buildings and adding new machinery, so as to be able to can the increased supply of fresh salmon that would come from this trap. In so increasing the capacity of the cannery eighteen thousand five hundred (\$18,500.00) dollars were expended (see evidence, Burckhardt, Rec., page 114). The Chinese contracts were made to put up this additional pack at the Chomly cannery and the tin and other supplies necessary in that connection were purchased, so that a failure to operate the trap would result in a loss to appellant of fifty thousand (\$50,000.00) dollars in a single year. All this was done in the Fall of

1915 and the Winter of 1915-16 (see evidence, Burckhardt, Rec., page 89 *et seq.*).

Along about the middle of March, 1916, the President of the appellant company carried on a correspondence with the Assistant Secretary of the Interior in relation to the leasing of the Metlakahtla cannery to Mr. Harris, and his representative in Washington was then informed that because of the opposition of Secretary Redfield no special fishing privileges would be granted to the lessee of the Metlakahtla cannery—that the waters were to be left open and that no one was to receive any special fishing privileges (see evidence, Burckhardt, Rec., pp. 118-119).

After being so informed and as soon as the weather was suitable preparations were made to drive the trap and on the 7th day of April the work in this connection was actually commenced with the result that on the 18th day of April, the driving of the trap was completed (see evidence, Burckhardt, Rec., p. —; affidavit of Jenkins, Rec., p. 152; also affidavit of Copeland, Rec., p. 153, and 2nd Finding of the Court, Rec., p. 188). The trap was completed at the expense of approximately four thousand (\$4,000.00) dollars.

There is some dispute in the evidence upon the question of whether the webbing was hung at that time, or whether the hanging of the webbing was delayed until the fishing season commenced, but this is quite immaterial, as the hanging of the webbing is a mere incident to putting the trap in fishing con-

dition. After the trap was driven and completed on the said 18th day of April, the proclamation of the President was issued. The proclamation is dated April 28, 1916.

The record shows and the Court found that the trap of the appellant is an ordinary fishing device such as is ordinarily and usually employed in catching salmon in the waters of Southeastern Alaska by those engaged in the fishing business (see evidence, Burckhardt, Rec., pp. 99-100, and 2nd Finding of the Court, Rec., p. 188).

It is contended on the part of the appellant that since it constructed its fish trap in connection with the exercise of its common right of fishery, the fish trap being an ordinary and usual device employed in that connection which it had a right at common law to employ, and the use of which was recognized and sanctioned by the acts of Congress, it acted lawfully and within its rights, and having expended its money and its labor in constructing a structure which it had a legal right to construct, it acquired a vested property right in the structure so constructed of which it could not be deprived by subsequent legislation or executive proclamation.

That the appellant had a common right of fishery in the navigable waters of the United States where the trap is now situate, prior to and at the time its fish trap was constructed cannot be denied. And since it had this right it follows that it had the right to

employ, use and install any suitable device necessary to the enjoyment of the right. The Legislature having the right to regulate the exercise of the rights of fishery and navigation may pass regulatory measures forbidding the use of such devices as in its judgment are destructive of the common right, either of navigation or fishery, or it may prescribe the manner in which this or that device may be used with the view of promoting the common rights of navigation and fishery, but in the absence of any legislation upon the subject any device whatever may be employed, at least so long as navigation is not obstructed.

This matter was before the Supreme Court of the State of Michigan in the case of *Lincoln v. Davis*, 53 Mich., 375; 51 Am. Rep., 116. In that case the plaintiff, who was a fisherman, had, in the language of the opinion "caused stakes to be driven in Thunder Bay commencing about a mile east of Sulphur Island and thence continued eastward for a distance of about 160 rods for the purpose of affixing thereto trap nets for fishing." It will be observed that the appliance there used was in all respects similar to the fish trap of the appellant. The defendant in the case under discussion had taken up and removed these stakes. The plaintiff brought trespass and recovered. On appeal the judgment was affirmed. In the course of an opinion by Judge Campbell, concurred in by Judge Cooley, it is said:

"Outside of the statutory line I think there can

be no doubt of the right of any one to fish with such appliances as are appropriate to open-water fishing. It has always been customary on these lakes to treat deep-water fishing and navigation as resting on the same basis, except in narrow waters or near shore, where fixed apparatus might have some relation to riparian occupancy as used in connection with it. Fishing such as was involved in this controversy has no natural connection with the dry land or its approaches. It is carried on altogether by the aid of vessel or boat navigation, and is fairly incidental to that class of business."

But appellant's right to use a fish trap as an appliance in connection with the exercise of its right of fishery does not in Alaska depend upon its common law right to do so. The right to employ fish traps for this purpose was recognized, sanctioned and regulated by an express act of Congress. Sections 261 and 262, Chapter 3 of the Compiled Laws of Alaska are as follows:

"Sec. 261. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five hundred yards of the mouth of any red-salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed.

"Sec. 262. It shall be unlawful to lay or set any drift net, seine, set net, pound net, trap, or any other fishing appliance for any purpose except for purposes of fish culture, across or above the tide waters of any creek, stream, river, estuary, or lagoon, for a distance greater than one-third the width of such creek, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red-salmon stream where the same is less than five hundred feet in width. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards end-wise of any other trap or fixed fishing appliance."

The appellant then having constructed a fish trap not only in accordance with and in the exercise of its common law right of fishery, but under and pursuant to and in accordance with an express act of Congress upon this subject, expended money and labor in the acquisition of property while in the exercise of a lawful right.

Not only has one who acquires property in a lawful manner and while in the exercise of a lawful right a vested right in such property in accordance with the general principles of law and the dictates of sound reason, but where one expends labor and money in the erection of fixed fishing appliances in the navigable waters, or has otherwise fitted a place in such waters for profitable fishing, such a one is entitled to pro-

tection in the enjoyment of the thing upon which such labor and money have been expended, as long as he continues in possession and occupation.

Farnham on Waters, Sec. 394;

Lewis v. City of Portland, 35 Pac., 256;

Pitkin v. Olmstead, 1 Root, 217 (Conn);

Lay v. King, 5 Day, 72;

Gallup v. Tracy, 25 Conn. Rep., 10;

Post v. Kreischer, 8 N. E., 365.

In *Farnham on Waters*, page 394, it is said:

“Every individual has the right to enjoy the public right and since no two individuals can enjoy precisely the same right at the same time, some rule must be observed as to the order in time in which the rights shall be exercised. In some instances this is regulated by custom. No person can acquire a right of fishing in a public fishery superior to any other, unless he has gone into the common waters and set up and established his pounds and stakes and taken possession of the line which those pounds and stakes included, with which a stranger can not directly interfere. . . . When labor is necessary to fit a certain place for profitable fishing, the one bestowing that labor is entitled to protection in this enjoyment as long as he continues in possession and occupation.”

In the case of *Pitkin v. Olmstead*, 1 Root, 217, it was held that where one in the exercise of his common right of fishery cleared a portion of the bed of a navigable river, he had a right to occupy and use the portion so cleared and improved by him during

the fishing season. Upon that question the Supreme Court of Connecticut say:

"The river being a public navigable river, it is for all the citizens to navigate their vessels in and to draw seines for the purpose of taking fish—that the bed of the river is the private property of no one but remains as public as the waters that flow in it—whoever therefore by labor and expense clears a fish place in its bed acquires a right to occupy and enjoy it in preference to any other and by long continued possession and occupation in the proper sense the right is strengthened and confirmed: and the defendants had no right to disturb or interrupt the plaintiffs in the exercise of their right in their own proper fishing place so long as they did not go upon their land."

And in the opinion in the case of *Lay v. King*, *supra*, it is said:

"Where a man by labor and expense makes a fishery without obstructing or infringing upon previously existing rights, he ought to be protected in the enjoyment of it."

The case of *Gallup v. Tracy* arose under a statute of the State of Connecticut entitled, "An Act for encouraging and regulating fisheries," which permitted every inhabitant to plant oysters in any of the navigable waters of the State, and with the consent of a committee appointed for that purpose by the town in which the same should lie, to mark, stake out and enclose the ground on which such oysters were planted. A party staking out such ground and planting such

oysters was held to have acquired a vested right in the oysters planted and to the occupation of the place where they had been planted of which he could not be deprived by a subsequent repeal of the statute giving the right. In passing upon this question the Court say: "We think the plaintiff had acquired a vested right in the oysters which he laid down and to the occupation of the place where he laid them down."

In the case of *Post v. Kreischer*, 8 N. E., 365, it was held that under the common law oyster fishermen had in connection with the exercise of the right of fishery a right to plant oysters in the bed of navigable waters and mark out the spot where the oysters were planted, and that upon so doing they acquired a right to the oysters produced within the area marked. This case arose in the State of New York and it will be observed that the Supreme Court of New York holds that a person planting oysters in the navigable waters and marking the area within which the oysters were planted, has the same right at common law that was conferred upon a person taking similar steps by the Connecticut statute considered in the case of *Gallup v. Tracy*, *supra*. In passing upon this question, the Supreme Court of New York say:

"The authorities sustain the proposition asserted by the plaintiff that by the common law oysters planted in a bed clearly marked out and defined in the tide waters of a bed or arm of the sea, which is a common fishery to all the inhabitants of the State where the bed or arm of the sea is situate,

where there are no oysters growing spontaneously at the time are the property of the person who plants them and the taking of them by another is a trespass for which an action lies.

“The planting of oysters in tide waters and the right of property in the person planting them is not regarded as an exclusive appropriation of the right of fishery common to all the inhabitants of the State, but as a legitimate exercise of the common right not inconsistent with its reasonable enjoyment by others.”

In the case of *Lewis v. City of Portland*, *supra*, the same legal proposition presented by the case at bar was before the Supreme Court of Oregon. Under the laws of the State of Oregon riparian owners had the right to construct wharves into the streams by which their land was bounded. A riparian owner in the City of Portland had constructed a wharf in aid of navigation and after the wharf had been constructed, the Legislature passed an act authorizing the City of Portland to construct a bridge across the river at a point and in a manner that would greatly damage the plaintiff's wharf. It was held by the Supreme Court of Oregon that this was an interference with a vested right, and that the wharf built could not be taken without the payment of compensation. In passing upon this, the Supreme Court of Oregon say:

“The statute simply grants permission or license to any upland owner in an incorporated town whose land fronts upon a navigable stream to construct a wharf in front of his land, which per-

mission, when acted upon, renders his wharf a legal structure. Its object is to encourage the building of wharves to aid navigation, and for the benefit of commerce. Within its purport, then, what difference would it make whether the wharf was built before or after the statute was enacted? In either case, the wharf would serve the object it sought to accomplish, and hence be a legal structure within its spirit and intent. But it is argued that the leave granted under the statute, being merely a permission or license, is revocable at the pleasure of the State; and that, as a consequence, the wharf of the plaintiff ceases to be a legal structure, or to have a legal existence, when the leave is withdrawn, or the license revoked. The statute has not been repealed, either directly or by implication, and, so far as it is concerned, there is no revocation of the license granted. The most that has been claimed for the Meussdorffer Act in that connection is that it—being for a public purpose—operates to revoke the license of the plaintiffs, and thereby to deprive their wharf of its legal foundation and existence. It will be observed, then, that the argument is based on the theory that the permission granted by the statute to build a wharf is merely a license, and, as such, may be revoked at the pleasure of the State, after it has been acted upon, and the wharf erected. But this is not so. As was said in *Bowlby v. Shively*, *supra*, the statute does not vest any right until exercised. It is a license revocable at the pleasure of the Legislature until acted upon and availed of. It is doubtless true that, if the statute should be repealed, or the adjacent tide lands disposed of, the privilege given the upland owner to build a wharf across the tide lands into deep water, unless acted upon or availed of, would be revoked. But the riparian owners who have taken

advantage of the permission or privilege to build wharves—especially those on fresh navigable waters, for the reasons suggested—have acquired rights that would not be affected by the repeal of the statute. These wharves are legal structures, and as such are private property, which cannot be taken without due process of law, and due compensation therefor. Hence the contention of the defendants that the Meussdorffer act—which authorizes the location and construction of the Burnside street bridge, and under which they are proceeding to build it—is a revocation of the leave or license, cannot be maintained. Nor do we find anything in the case of *Illinois Cent. R. Co. v. Illinois*, *supra*, in conflict with this result. There the grant of the submerged soil of the lake was in such quantity as, in the opinion of the Court, impaired the public interest in its waters, and operated, if irrepealable, as an abdication by the State of its trust over the property. The right of a riparian owner to build a wharf over the submerged soil of a river to navigable water is not inconsistent with the public interest, nor in prejudice of the public rights. Nor does the grant of such subjacent soil or tide lands subject to the paramount right of navigation and commerce authorize its use for any purpose inconsistent with the public interest. The land in front of the riparian owner, when used for a wharf, and under proper regulation, is in aid of navigation, and for the benefit of commerce. Of course, the State has the right to regulate the building of wharves, or to determine how far rights in submerged soil can be exercised consistently with the easement of navigation. Our State has made such regulations and, as there is no claim that the wharf of the plaintiffs impedes navigation, or is not erected in conformity with its requirements,

it must be regarded as a legal structure, and entitled to be protected as private property. Although the evidence shows that the original wharf was torn down and rebuilt in the year 1876, in conformity with the ordinance, we have not deemed it necessary to refer to that fact as strengthening the right of the plaintiffs in the premises.

“Without further reference, it is sufficient to say that we think the plaintiffs have a right of property in their wharf of which they cannot be deprived except in accordance with established law, and, if it should be necessary that it should be taken or destroyed for the use of the bridge, that it cannot be done without due compensation therefor.”

This case is in point not only because the principle involved is the same as that involved in the case at bar, but more especially because the facts to which the principle is applied are of like character. In the case under discussion the right of the riparian owner within an incorporated town to build a wharf to deep water existed under an Oregon statute. In the case at bar the right to build a fish trap exists both at common law and under the statute. Of course the origin of the right, that is to say the question of whether it springs from the common law or from the statute, does not affect or alter it so long as it exists.

In the case under discussion the right to build a wharf existed to facilitate the common right of navigation. In the case at bar the right to construct a fish trap exists to facilitate the exercise of the common right of fishery. In the case under discussion the structure that formed the subject of the controversy,

that is to say the wharf, was a fixed immovable structure consisting of piles driven in the ground in such a way as to support a platform. In the case at bar the structure under consideration is a fixed and immovable structure consisting of piles driven in the ground closely together and in such a manner as to form chambers for the purpose of entrapping fish. In the case under discussion the wharf was constructed while the right to construct it existed. In the case at bar the fish trap was constructed while the right to construct it existed. In the case under discussion the Oregon Legislature passed an act interfering with the maintenance and use of the wharf after it had been constructed. In the case at bar, the President issued a proclamation interfering with the maintenance and use of the fish trap after it had been constructed. In the case under discussion the Supreme Court of Oregon held that in so far as the statute interfered with the maintenance and use of the wharf it was void in that it interfered with vested rights. In the case under discussion it must follow that the President's proclamation is void in so far as it interferes with the maintenance and use of the fish trap in that it interferes with vested rights.

So also in the case of *Middleton v. Flat River Booming Company*, 27 Mich., 533. Certain mill owners had erected dams in the Flat River for the purpose of developing power to operate their mills. The Flat River Booming Company was interfering

with the use of these dams in the stream and the development of power in connection with the operation of these mills by placing obstructions in the stream above the dams and impounding the water with a view of suddenly releasing it so as to assist in the floatage of logs. This conduct on the part of the Flat River Booming Company resulted in injury to the owners of the mills. The defense was that the Flat River Booming Company was incorporated under a law that gave it the right to do the things complained of, but the Court held that the right to float logs in a general sense and the right of developing power by means of dams were both public rights of such a character that one should not be exercised to the exclusion of the other, but that in the exercise of one of these rights due regard should be given to the right to exercise the other in order that both might exist together. And that the statute authorizing the Booming Company to do the acts complained of could not impair or interfere with the maintenance of the dams, since the right to maintain these had become vested and could not be divested by subsequent legislation. In passing upon this question Judge Cooley, speaking for the Supreme Court of Michigan, says:

“Another position of defendants is that being incorporated company and authorized by the act under which they were organized to do the act complained of, they are not liable to such suits

by private parties. . . . The incorporation act can not be understood as intending to authorize the companies formed to destroy vested rights of property."

In the case of *Glover v. Powell*, 10 N. J. Eq. (2 Stockt.) 211, the principle here contended for was applied by the Supreme Court of New Jersey. An act of the New Jersey Legislature empowered the defendants to maintain a dam across the mouth of a small creek, which the Court held was not navigable in fact, with a view of improving adjoining meadows. In the construction and maintenance of this dam the defendants had expended about eight thousand dollars. By a subsequent act of the Legislature enacted after the dam had been constructed, it was provided that this small creek should be considered a public highway and that the dam previously erected should be removed. The Court held that the defendants had a vested right in the dam of which they could not be deprived by a subsequent act of the Legislature. The Chancellor says:

"The dam and water works in question are private property. They have been constructed, maintained and paid for by the owners of the meadows along the creek. They have been acquired under the express sanction of law."

It will be observed that in the Michigan case, the dam was constructed under a right existing at common law while in the New Jersey case the dam was con-

structed under a statute authorizing its construction. But in either case whatever the source of the right, the parties acted within their lawful rights in constructing the dam, just as the appellant in this case acted within its lawful right in constructing the fish trap. The dams constructed also were fixed and immovable in their character just as is the fish trap constructed by the appellants. The property rights acquired in the cases under discussion were identical in character with the property rights acquired by the appellant. If the property rights acquired by the parties in the cases under discussion were vested rights of which they could not be deprived by subsequent legislation, the property right acquired by the appellant must for the same reason be regarded as a vested right that can not be impaired or destroyed by executive proclamation.

This legal proposition, in connection with those previously discussed, presents a public question of the highest importance. The Alaska fisheries are among the largest in the world. Many millions have been invested in them. They have given employment to thousands of fishermen, including both Indians and white men, to say nothing about the large number of Orientals employed about the canneries, and they have filled the markets of trade with a food product that is at the same time cheap, palatable and nutritious. That this industry should be preserved and protected is not only a matter of great concern to the people of

Alaska who look to it for employment and participate in the profits resulting from it, but also to the many thousands residing elsewhere in the United States who because of the high price of meat look to it for a cheap and wholesome food supply. However important therefore the decision in this case may be to the appellant because of its direct effect upon its property rights, the decision is of far greater importance to the public at large.

Seventy-five per cent. of the fish caught in South-eastern Alaska are caught by means of fish traps. (See evidence Burckhardt record, page 100). These traps consist of piles driven in the ground as closely together as possible and in such a manner as to form chambers into which the fish are led by means of a single row of piles extending out from the trap and called the "lead." Web is hung over the piles so driven in order to prevent the fish from escaping through the spaces that necessarily exist between the piles however close they may be driven. This appliance can of course not be constructed except in comparatively shoal water, so shallow that piles can be found long enough to reach from the surface to the bed into which they must be driven. The trap therefore can only be employed in intercepting and entrapping such fish as happen to pass within a short distance of shore. This has led the owners of the various Alaska fisheries to construct traps here and there at advantageous points along the shores of the

many islands, as well as the mainland of Southeastern Alaska.

The Alaska Indians live in villages which dot the shores of all the larger islands as well as those of the mainland. Many of these villages are very much larger than the village of Metlakahtla where the Metlakahtlans reside. While these Indians belong to different tribes the individuals of one tribe do not differ materially from the individuals belonging to any of the other tribes. All the coast Indians including the Metlakahtlans have the same characteristics. If, therefore, the waters surrounding Annette Island should be set aside for the exclusive use of the Indians residing in the village of Metlakahtla, there is no reason in law or in morals why the waters surrounding the various islands situate in Southeastern Alaska should not be set aside for the exclusive use of the several tribes inhabiting those islands. In fact our government owes a far greater duty to the Indian tribes that inhabited Alaska at the time of its purchase from Russia than it does to the Metlakahtlans who were at that time inhabitants of British Columbia. Yet it is plain to see that if the same action were taken for the benefit of the other Indian tribes that has been taken for the benefit of the Metlakahtlans the white fishermen would lose their employment and means of making a livelihood and the fisheries would be forced to retire from business

with the consequent loss of the capital invested. Nor is this the expression of a groundless fear.

Not only is there every reason why these additional reservations should be created, if the one now under consideration is a valid and proper one, but since the commencement of this suit what are referred to in the newspaper reports from Washington as the "ancient fishing grounds of the Chilcats" were by executive proclamation reserved for the exclusive use of the Chilcat tribe. This reservation is situate on the Chilcat River, a stream that flows into salt water a short distance from appellant's Chilkoot cannery. No one knows to what extent the public fisheries in Alaskan waters will in the future be affected by these executive proclamations, but everything points to the entire destruction of the public right for the benefit of the various Indian tribes.

And even though no new reservations should be created the effect of the existence of the right to create them, if that right should be established, would be almost as disastrous to the fisheries as the actual creation of the additional reservations. For no one would know who would be the last to stand or the first to fall. Cannery supplies must be bought in advance and traps must be driven in advance of the fishing season. If then any cannery man can be prevented by executive proclamation from fishing in the waters in the vicinity of his plant, he cannot, with any assurance, invest his money in supplies, in the driving of traps,

or in the making of other preparations in advance, for this done, he may find as did the appellant in this case that the waters from which he must secure his supply of fish are closed to him before he can use his supplies or employ his traps for the purpose designed.

As late as the month of March in this year, the representatives of the appellant were advised by the officials at Washington that the waters surrounding Annette Island would be open to every one and that no special fishing privileges would be given therein (See evidence Burckhardt, Record, pages 118-119). Upon these assurances appellant's trap was driven, and the trap had only been completed ten days when the executive proclamation was issued forbidding its operation, so that if the proclamation is a valid one the appellant is deprived not only of the money expended in connection with the construction of the trap itself, but is also obliged to bear the loss occasioned by the purchasing of its supplies in advance and the employment of the necessary Oriental labor in advance. Surely no one is warranted in carrying on business on so unstable a basis. If the public can thus by executive proclamation be excluded from portions of the navigable waters, the public right of fishery ceases to be of value. No one can make preparations to enjoy this right for he has no assurance that the right will still exist when his preparations have been made. Every reason that demanded the opening of the navigable waters to the public so

that they might exercise therein their common right of fishery that existed at the time of Magna Charta exists with equal force at the present time and the affirmative sanction given by Congress itself to the exercise of the right by passing numerous statutes in connection with its regulation furnishes an additional reason why the right so sanctioned should not be subject to invasion by executive proclamation.

It must of course be conceded that the President in making the proclamation under discussion was actuated by the highest motives and not by any desire to violate or impair private rights. His sole motive was undoubtedly that of assisting an inferior race and no motive could be more lofty. But the effect of the proclamation on the business and property of the appellant is none the less disastrous. That the President did not intend the proclamation to have this effect and that the money lost was lost in helping along a good cause does not compensate the appellant for the loss sustained.

That in the past the Indian has not been getting much the better of it can not be denied, but this has been due more to the bunglesome manner in which Indian affairs have been handled than to a lack of good intentions. In the States the Indians have been herded on reservations with the natural result that they have almost become extinct. It has long been a known fact that herds of wild animals soon become extinct when confined. The Indian is not a wild

animal but his roving nature and outdoor life have made him such that he thrives under the same conditions that permit wild animals to thrive. And being confined in the reservations the Indians have become extinct for the same reasons that wild animals would become extinct under like circumstances.

In Alaska the Government has at least until very recently never done everything for the Indian except in the single case of the Metlakahtlans, who, as already has been said, were not Alaska Indians. The Indian has been compelled to rely upon his own resources and instead of being confined to a reservation has been permitted to live in and about the white settlements. The effect upon the Indian has not only been salutary but marvelous. His simple mind is most receptive and he responds to even the slightest change in his environment with surprising alacrity. He, like the white man, is the product of his environment, but due to the fact that he has not yet formed the habit of the white man of meeting everything new with an interrogation point, the effect of a change in his environment upon him is more marked and immediate. This is best illustrated by the cases of those Indians who have been sent to Eastern universities. They return home entirely transformed. The change in environment so affects them that they no longer resemble the Indian in appearance, even their skin seems to have whitened because of their new surroundings. Some will tell us that this is because of

the fact that they have been educated and taught new things. Not so. For, place these same Indians back in an Indian camp and in six months they do not differ from other Indians. They have not lost their education, but they have responded to the change in their environment. Education may enlarge and add to the environment. It may select from any environment those things which form the most wholesome subjects for mental activity. To this extent it affects the individual, white or Indian, and no further.

When the white man came to Alaska he changed the environment of the Indian and the Indian has responded to the change so effected with the result that the Indian of to-day is in no sense the Indian of thirty years ago. Then he was a roaming, roving savage. To-day he is in many respects a useful member of society. Unlike the Indians of the States, the Alaska Indians are neither wards nor mendicants, but independent, self-reliant human beings. They are good miners, good fishermen, good carpenters and among them may be found many highly skilled mechanics. That this is the result of the change in environment brought about by the advent of the white man is illustrated by the case of the Metlakahtlans. These Indians received a much earlier start on the road toward civilization than did those further north. When Father Duncan was added to their environment he brought with him all the changes that a single, able, courageous and benevolent man could bring, and

the Indians in that case, as in other cases, responded quickly to this change in their environment. They made remarkable progress, but unfortunately our benevolent Congress reserved for their exclusive use Annette Island. Father Duncan was there but no other white man could come. Their environment had been changed and they had responded to the change, but further changes were prevented and thereby further progress was blocked. If they have made any progress at all in late years it is because they have not been closely confined to Annette Island so that they have been to some extent brought in contact with the conditions that exist in the neighboring white settlements. The net result has been that although the Metlakahtlans received a much earlier start, the Indians residing about Juneau, Douglas, Sitka and other white settlements have surpassed the Metlakahtlans in the race for civilization.

The development of the fisheries and mines of Alaska has been responsible for the changed environment to which the Indian has adapted himself and which has resulted in the amazing progress he has made. But let the public waters be reserved for the use of the Indian so that the fisheries and the white fishermen are compelled to withdraw and the Indian will slink back to savagery to the exact extent that the changes in his environment wrought by the introduction of the fisheries and the white fishermen have been withdrawn, just as surely as the Indian college

graduate loses newly-acquired characteristics upon returning to his native tribe.

However lofty our motives may therefore be and however pure our intentions in creating private fisheries for the use of the Indians, the ultimate effect of our action upon the Indians themselves is bound to be quite the reverse from what we had intended it to be.

RIVERS AND HARBORS ACT.

It is contended on the part of the Government that the construction of appellant's trap was illegal because its construction had not been authorized by the Secretary of War under the provisions of the Rivers and Harbors Act. That act provides:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structure in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War";

Appellant's trap is situate in an arm of the North Pacific ocean many miles in width; is built on a rocky reef extending out from the westerly shore of Annette

Island; is equipped with lights and with a bell and the locality within which the trap is situated is not used by ships for the purpose of navigation, the place being out of the line of travel. The trap being situate, however, on a reef and being equipped with lights and a bell would, if the waters were used by ships, serve as an aid to navigation in that it would warn ships off from the rocky reef on which the trap is built. (See evidence Burckhardt, Record, page 97 *et seq.*, also see map, Record, page 179, and Finding No. 2, Record, page 188).

The Court's finding upon this subject is as follows:

"that the said fish trap so constructed or about to be constructed is a usual and ordinary fishing appliance and as is ordinarily used by those engaged in catching salmon in the waters of South-eastern Alaska; that the portion of said trap nearest to the shore of Annette Island is situate two hundred feet to the seaward from the line of extreme low tide, and that although the said trap is in navigable water of the United States, technically speaking, it is not within any portion of the waters of the United States, which are, or ever have been, used for the purpose of navigation, and is not in, and is not an obstruction to, the navigable capacity of any of the waters of the United States in the sense used in the Rivers and Harbors Act, approved March 30, 1899."

It can not of course be contended that appellant's trap standing as it does on a rocky reef on the shore of the open sea is an obstruction to the navigable capacity of any of the waters of the United States.

But it was contended at the trial on the part of the Government that since the trap was situated in waters of the United States at a point where no harbor lines had been established, it could only be constructed upon plans recommended by the Chief of Engineers and authorized by the Secretary of War. This brings up for discussion the question of what is meant in the Rivers and Harbors Act by the phrase, "or other water of the United States" following the words "in any port, roadstead, haven, harbor, canal, navigable river."

It is a rule of construction that where a statute enumerates specific things and follows such enumeration with a general term, the general term will be held to include only such things as are of like character to those previously enumerated. This rule is of course based upon the principle that courts in construing acts of the Legislature should give each word employed effect if possible. For it is not to be presumed that the Legislature made an idle use of words. So in this case, there must be some reason why Congress used the language, "in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States." If it had been the intention of Congress that the establishment of a breakwater, bulkhead or like structure should be prohibited in any water of the United States except upon plans recommended by the Chief of Engineers and authorized by the Secretary of War, there would have been no occasion for the employment of the words, "port,

roadstead, haven," etc. Congress would simply have said, "in any water of the United States," and would have omitted the enumeration of specific places by which this general term is preceded. All the specific places enumerated are those in which traffic is apt to become congested. It is so with a port, with a roadstead, with a haven, with a harbor, with a canal and with a navigable river. And it is clear when Congress follows these specific terms with the general term, "or other water of the United States," it had in mind other waters of the United States only in which traffic might become congested. There is a reason why harbor lines should be established in places of this character or why structures should in the absence of established harbor lines be in these places constructed in an orderly and systematic manner. Piers, wharves and other structures which would if systematically constructed not interfere with navigation or be aids to navigation, would become nuisances if allowed to project one in front of the other or to be placed haphazard here and there without system or order. But this does not apply to structures built out on the shore of the open sea, and it would lead to ridiculous conclusions to assume that it was the intention of Congress that every one building a wharf, fish trap or other structure whatsoever anywhere along the thousands of miles of coast line of Alaska was to do so only upon plans approved by the Chief of Engineers and authorized by the Secretary of War.

Owing to the precipitous character of the mountains and their abrupt rise from the water's edge, white settlers and Indians alike have at innumerable points along the Alaska coast driven piles and erected thereon structures of every kind and character. The necessities of the situation have compelled the construction and erection of these structures, and while they serve many useful purposes they do not affect navigation one way or the other. Most of them are small; many temporary. In most cases they are erected in out of the way places where surveyors can not be had, and in other cases they are such as not to warrant the expense of employing a surveyor to make a survey and prepare plans even though a surveyor might be in reach. Clearly it was not the intention of Congress to place upon those erecting these structures the useless expense of preparing plans and submitting these to the Chief of Engineers, nor was it the intention of Congress to place upon the Chief of Engineers or the Secretary of War the burden of going over and approving plans for all these innumerable projects.

The rule of statutory construction above referred to is so generally understood that it needs no citation of authorities to support it, but reference will be made to the single case of the *United States v. Bevans*, 3 Wheaton, 336. In that case the defendant was indicted for murder committed on the United States battleship Independence, and was tried and convicted in the Federal Courts under an act of Congress which

provided: "That if any person or persons shall
 "within any fort, arsenal, dockyard, magazine, or any
 "other place, or district of country, under the sole and
 "exclusive jurisdiction of the United States, commit
 "the crime or wilful murder, such person or persons,"
 etc. It was contended that the deck of the United
 States battleship was a place within the exclusive
 jurisdiction of the United States and that because of
 this the Federal Courts had jurisdiction under the act
 quoted. But Chief Justice Marshall held otherwise
 and in passing upon the matter said, "the objects
 "with which the word 'place' is associated are all
 "in their nature fixed and territorial. A fort, an
 "arsenal, a dockyard, a magazine are all of this char-
 "acter. When the sentence proceeds with the words
 "'or any other place, or district of country, under the
 "'sole and exclusive jurisdiction of the United States,'
 "the construction seems irresistible, that by the words
 "'other place' was intended another place of a similar
 "character with those previously enumerated and with
 "that which follows. Congress might have omitted
 "in its enumeration some similar place within its
 "exclusive jurisdiction which was not comprehended
 "by any of the terms employed, to which some other
 "name might be given; and therefore, the words
 "'other place,' or, 'district of country,' were added,
 "but the context shows the mind of the Legislature
 "to have been fixed on territorial objects of a similar
 "character."

The intention of the Legislature in this connection is evident not only from the fact that the general term "waters of the United States" is preceded by an enumeration of specific places such as ports and harbors, where traffic is often congested and where order and system is required in the construction of wharves and other structures, but also from a consideration of the other provisions of the act. It is first made unlawful to create any obstruction to the navigable capacity of any of the waters of the United States. This provision is broad and refers to all structures whatsoever in whatsoever place so long as the place is in the navigable waters of the United States. There are, however, structures such as those afterwards enumerated in the act that might be lawfully erected notwithstanding the first provision, including structures that either do not impair the navigable capacity of the waters within which they are erected and such as wharves and piers that serve as aids to navigation. Yet these structures while they might not obstruct the navigable capacity of the waters in which they are situate, they might when placed in ports, harbors, havens, rivers or other like places become a nuisance, unless constructed along orderly and systematic lines, and accordingly provision is made with a view of providing for their construction along such lines. Where harbor lines are established it is provided they shall not extend out beyond such harbor lines and if

harbor lines have not been established, the structure shall be built upon plans approved by the Chief of Engineers and authorized by the Secretary of War.

That the fish trap of appellant is not within a harbor, port, roadstead, haven, navigable river or other like place is evident from a glance at the map and is also testified to by Mr. Burckhardt. And the Court also found as an affirmative fact that "although the said trap is in navigable waters of the United States technically speaking, it is not within any portion of the waters of the United States which are, or ever have been, used for the purpose of navigation and is not in, and is not an obstruction to the navigable capacity of, any of the waters of the United States in the sense used in the Rivers and Harbors Act approved March 31, 1899."

This proposition also presents a public question of much importance. A very large per cent. of the people residing on the Alaskan coast are living in houses placed upon piles driven in the tide flats. This is true even in the case of the larger cities such as Ketchikan, Fort Wrangle, Juneau and other towns. In addition to this small wharves and landing places have been built here and there along the Alaska coast for a variety of purposes and uses. And except in the case of a very few of the larger wharves no one has ever deemed it necessary to consult the Chief of Engineers or the Secretary of War with reference to

these structures. If, however, these structures should be held to come within the meaning of the Rivers and Harbors Act, all these settlers would be guilty of a crime and subject to punishment. Not only is the matter of the construction of this act of importance as far as the persons who have already erected such structures are concerned, but it is also highly important in that it materially affects the future development of the territory. If every man operating in an out of the way place is compelled to prepare plans and submit them to the Chief of Engineers and obtain the consent of the Secretary of War before he can construct a landing place or build a platform with a view of erecting thereon a house or other structure, it will put a stop at least to the work of those who in connection with small operations require the use of such structures, especially where such operations are carried on at remote points. The reasons why this would result are obvious. Clearly this was not the intention of Congress.

A reasonable construction of the act, however, in accordance with the well established rules of statutory construction will not require a submitting of plans to the Chief of Engineers or the Secretary of War for the erection of structures that do not obstruct the navigable capacity of the waters within which they are placed unless these structures are built in harbors, ports, navigable rivers or other like places where they

might prove a nuisance, unless erected in an orderly and systematic manner, and this is as it should be.

Respectfully submitted.

HELLENTHAL & HELLENTHAL,
Attorneys for Appellant.

No. 2828

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA PACIFIC FISHERIES, a Corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

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for the District of Alaska, Division No. 1.

STATEMENT.

This is a suit by the Government of the United States for an injunction to prohibit the appellant from fishing within a so-called "Reserve" of public waters surrounding Annette Island in Alaska, and to require removal of a fish trap constructed by appellant therein.

The material facts of the case are as follows:

I.

The appellant is an Oregon corporation carrying on the business of catching, canning and marketing salmon, operating three canneries in Alaska, one of which is situated at Chomly and another at Yes Bay.

II.

The principal means of obtaining salmon for supplying all the canneries in Alaska is by use of traps; a trap consists of a line of piles called a "lead" with wire webbing thereon and lateral projections at the end toward which the fish travel called a "heart," which guides the fish into an enclosure called a "pot" which confines them until they are taken therefrom into scows in which they are conveyed to canneries.

III.

In the year 1915 C. A. Burckhardt, president and general manager of the appellant, selected a location for a fish trap, not theretofore occupied, situated in front of a rocky reef adjacent to Cedar Point and Smugglers' Cove on the west side of Annette Island; and in the spring of this year the appellant constructed a trap there at a cost of \$4,000, that being the trap which is the principal subject of controversy in this suit.

IV.

Cedar Point projects into Clarence Strait, which at that place is twelve miles wide and is one of the main divisions of the waters of Southeastern Alaska.

V.

The trap as constructed is not an obstruction or impediment to navigation, but being equipped with lights and a bell it is helpful to navigators the same as a light-house would be; and it is not connected with the island, the end thereof nearest to the shore being at least 200 feet seaward from the shore line at low tide, and use of the trap does not require any occupation or use of the island or its shore.

VI.

On the 28th of April, 1916, the President issued a proclamation declaring the waters within a space of 3,000 feet from the shore line at mean low tide surrounding Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets to be a reservation for the benefit of the Metlakatlangs and such other Alaskan natives as have joined them or may join them in residence on these islands; and warning "all unauthorized persons not to fish in or use any of the waters" therein described. And within a few days thereafter the appellant was notified of said proclamation and to not fish or trespass within the space therein described.

VII.

The appellant's trap is located within said space and it was completed, except the placing of webbing thereon ten days prior to the date of the proclamation; and prior to that time the appellant had in preparation for this season's operation of the two canneries at Chomly and Yes Bay expended money and incurred obligations to an amount exceeding \$500,000 for materials, supplies and labor, in expectation that said trap would to a very considerable extent supply fish for canning in said two canneries.

VIII.

Deprivation of the use of said trap this year must necessarily cause a heavy loss to appellant, estimated at \$50,000.

IX.

The appellant gave notice that it would not submit to such deprivation and loss, and denied the lawfulness of the President's Proclamation; this suit was instituted; the appellant answered the bill of complaint and the case was tried and submitted for decision on the merits and the Court rendered a decision and final decree granting the injunction prayed for, unconditionally, which if not set aside will be effective to confiscate appellant's property without compensation.

X.

Prior to the year 1887 the Metlakatlangs were a tribe of Indian natives of British Columbia inhab-

iting the village of Metlakatla near Fort Simpson, B. C. They are reputed to have been, in their savage state, cannibals, but superior in physical and mental qualities to other Pacific Coast Indians. As a result of the missionary labors of William Duncan, a minister of the Church of England, they were converted to Christianity and made rapid progress in becoming educated and acquiring skill as mechanics and to a praiseworthy extent adopted the manners of civilized people and became devout members of the Episcopal Church. They constructed and operated a saw mill and erected a commodious church edifice and were generally thrifty and contented.

About the year 1887 the bishop having jurisdiction deposed Duncan from the position of minister in charge of the village and installed a successor; this was for the reason that Duncan had deleted part of the ritual of the church pertinent to the sacrament of the Lord's Supper which he claimed was contradictory of what he had taught the people as to the sinfulness of eating human flesh and drinking human blood. The people revolted against the action of the bishop and to get from under his jurisdiction they emigrated, en masse, to Annette Island. Several United States Senators and prominent citizens became interested in the matter by reason of the peculiar history and conduct of these people and it may be fairly inferred that their influence was potential in securing the enactment in 1891 of the Act of Congress quoted in the President's Proc-

lamation, making the Annette Islands a reservation for their occupancy. Later, recognizing their desire for freedom to engage in commerce and their abilities, Congress enacted a special law authorizing the licensing of Metlakatlans as masters, pilots and engineers of vessels, thereby granting to them privileges not accorded to other aliens.

XI.

The issue made by the pleadings and decided by the District Court, as epitomized in the memorandum decision filed is as follows:

“The Government by this suit seeks an injunction to prevent the defendants from operating said trap and to compel the removal of said trap, basing its suit on the claim that the continuance of the trap at the *locus quo* is in defiance and violation of the terms of the act and the proclamation, and is also in violation of section 10 of the Rivers and Harbors Act approved March 3, 1899.

Defendants contend that the Act itself does not reserve any water and that the proclamation is unauthorized so far as it attempts to reserve any part of the waters and so is null and void, and that the trap is not an obstruction to navigation and so does not come under the inhibition of the Rivers and Harbors Act aforesaid.”

ASSIGNMENTS OF ERROR.

First Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 1 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 1, which said proposed (166) Finding of Fact No. 1 is in words and figures as follows:

“Defendants’ Proposed Finding No. 1.

The Court finds that in August of the year 1915, the defendants, pursuant to observations previously made, went upon the present site of the defendants’ fish-trap off Cedar Point, Annette Island, and made soundings and by the use of a diver made such observations as were necessary to determine the question of the feasibility of constructing a fish-trap at that place, and in this connection the Court finds that as the result of such observations the defendants decided that the driving and constructing of a fish-trap upon the site now occupied by the defendants’ trap was practicable and feasible.”

Second Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 2 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 2, which said

proposed Finding of Fact No. 2 is in words and figures as follows:

“Defendants’ Proposed Finding No. 2.

The Court finds that pursuant to and subsequent to the observations made in the month of August, 1915, referred to in Defendants’ Proposed Finding No. 1, the defendants decided to drive and construct a fish-trap upon the site now occupied by the defendants’ trap and to enlarge their cannery at Chomly by installing therein such additional machinery and equipments as were necessary to pack the fish that would be caught and supplied by the fish-trap to be constructed off Cedar Point; that in the fall of 1915, and the winter of 1915-16, the Chomly cannery of the defendants was so enlarged and so supplied with additional equipment and machinery at an expense of approximately eighteen thousand five hundred (\$18,500.00) dollars.

That in the judgment of the defendants the trap to be constructed off Cedar Point would supply 600,000 fish which, when canned, would fill 50,000 cases of canned salmon; that the defendants during the winter of 1915-16 contracted for the Chinese labor and purchased the tin and other supplies necessary to the canning of the said additional 50,000 cases of salmon at Chomly, at an expense to the defendants considerable in excess of twenty-five thousand (\$25,000.00) dollars.” (167)

Third Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 3 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 3, which said proposed Finding of Fact No. 3 is in words and figures as follows:

“Defendants’ Proposed Finding No. 3.

That during the winter of 1915-16 the defendants procured the necessary piles and other equipment to drive and construct a trap off Cedar Point upon the site of the defendants’ present trap and on the 7th day of April in the spring of the year 1916 commenced the driving of such trap and completed the driving thereof on the 18th day of April, 1916, and that the defendants expended in this behalf a sum in excess of four thousand (\$4,000.00) dollars.”

Fourth Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in refusing to make and adopt Finding of Fact No. 4 as requested by the appellant and to find the facts as stated in said Finding of Fact No. 4, which said proposed Finding of Fact No. 4 is in words and figures as follows:

“Defendants’ Proposed Finding No. 4.

That all available sites for fish traps, so far as known to the defendants, within the area from which fish can be supplied to the Chomly cannery of the defendants, have been occupied and there are no salmon to be purchased upon the market within the area from which such salmon can be taken to Chomly and canned in order to furnish the Chomly cannery with the fish necessary to fill the 50,000 cases representing the increased capacity of the cannery.”

Fifth Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 1 and in finding the facts as in said Finding No. 1 (168) stated, which Finding No. 1 as made by the Court is in words and figures as follows:

“That by the 15th section of the Act of Congress approved March 3, 1891, entitled “An Act to Repeal the Timber Culture Laws’ (26 Stats. L. 1101) and by the Proclamation of the President dated the 28th day of April, 1916, there was reserved from use, occupation, settlement or benefit by any except Metlakat-lans and other Indians, the following lands and waters, to-wit: ‘The body of lands known as Annette Islands, situate in the Alexander Archipelago, in Southeastern Alaska, on the north

side of Dixon's Entrance' and 'the waters within 3,000 feet from the shore at mean low tide of Annette Island, Ham Island, Lewis Island, Spire Island, Hemlock Island and the adjacent rocks and islets' and 'the bays of the said islands, rocks and islets'; and that by said Proclamation warning was 'expressly given to all unauthorized persons not to fish in or use any of said waters.' "

Sixth Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 3 and in finding the facts as in said Finding No. 3 stated, which Finding No. 3 as made by the Court is in words and figures as follows:

"That prior to the issuance of the Proclamation hereinbefore mentioned T. A. Heckman, superintendent of the defendant company, stated to P. E. Harris that he knew that a Proclamation in the premises was about to be issued by the Government."

Seventh Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in making and adopting its Finding of Fact No. 5 and in finding the facts as in said Finding No. 5 stated, which Finding No. 5 as made by the Court is in words and figures as follows:

“That notwithstanding said Act, Proclamation and notice, said defendant did maintain at the time of the filing of this suit, and does now maintain possession of the area enclosed by said piles and refuses to remove the same and refuses to vacate the premises, and threatens and is about to and will, if not enjoined, perfect said trap as a fishing device and will catch (169) therein large numbers of valuable fish and will further trespass upon said land and water so reserved as aforesaid to the irreparable injury of plaintiff, both in its sovereign capacity and as owner and proprietor, for which plaintiff would have no plain, speedy or adequate remedy at law.”

Eighth Error Assigned.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 1 requested by the defendants, which said Defendants 'Proposed Conclusion of Law No. 1, is in words and figures as follows:

“Defendants' Proposed Conclusion of Law No. 1.

The Court holds as a matter of law that in the construction of a fish-trap off Cedar Point, Annette Island, and the maintenance thereof the defendants were engaged in the exercise of their common right of fishery, and being so

engaged in the exercise of a lawful right they acquired a vested right in said fish-trap from which they could not be divested by a subsequent proclamation of the President or otherwise without compensation."

Ninth Error Assigned.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 2 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 2 is in words and figures as follows:

"Defendants' Proposed Conclusion of Law No. 2.

The Court concludes as a matter of law that the reservation of Annette Island as made by the Act of Congress March 3, 1891, reserved the lands to ordinary high-water mark only and did not include any of the navigable waters of the United States, and that the proclamation of the President referred to in the pleadings herein was made without authority of law in that the power to control and dispose of the territories and other property of the United States is by the Constitution vested in Congress." (170)

Tenth Error Assigned.

The District Court for the Territory of Alaska, Division Number One, erred in refusing to conclude

as a matter of law and adopt as its conclusion of law, Conclusion of Law No. 3 requested by the defendants, which said Defendants' Proposed Conclusion of Law No. 3 is in words and figures as follows:

“Defendants' Proposed Conclusion of Law No. 3.

From the facts found the Court concludes that the plaintiff is not entitled to the relief demanded or to any relief whatsoever.”

Eleventh Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in concluding as a matter of law and making and entering its Conclusion of Law, which is in words and figures as follows:

“That plaintiff is entitled to an injunction as prayed for in the complaint.”

Twelfth Error Assigned.

That the District Court for the Territory of Alaska, Division Number One, erred in entering its judgment and decree herein, which is in words and figures as follows: * * * . Record, p. 212.

The concrete questions comprehended in the issues, stated concisely by Judge Jennings in his memorandum decision are as follows:

FIRST.

The Government affirms and the appellant denies that the erection of appellants' fish trap was an

invasion of a reservation created by Act of Congress, and therefore, its use by appellant is prohibited by law.

SECOND.

The Government affirms, and the appellant denies, that said Act of Congress supplemented by the President's proclamation creates a reservation comprising waters surrounding Annette Island including the space in which said fish trap is situated, and therefore, the erection and intended use of said trap by appellant is in defiance of the Government.

THIRD.

The appellant affirms and the Government denies that the President's proclamation is unlawful and void.

The only additional question within the issues tendered by the bill of complaint was decided adversely to the Government; therefore we assume that it is not involved in this appeal.

If counsel for the appellee shall make any argument upon it we will make answer thereto in a reply brief.

ARGUMENT.

From start to finish our argument aims at one object, that is to demonstrate that:

There Is No Equity in the Bill.

It is to be kept in mind that the suit is not defensive of any policy of conservation having regard

to the greatest good to the largest number; an injunction is prayed for not to protect salmon from the rapacity of destroyers; viewed either as being a measure of benevolence designed by the Government for the special and exclusive advantage of the small number of people inhabiting Annette Island, which it is not; or as a scheme to suppress competition in fishing for the exclusive advantage of one individual, which it is, the suit, if successful, can only promote monopoly detrimental to the public welfare.

Taking up the questions stated, successively in their order, the appellant controverts the claim asserted in behalf of the Government that the location of appellant's fish trap is within the boundaries of the reservation established by an Act of Congress.

That location is entirely within space covered by water; the end of the trap nearest to the shore at the line of extreme low tide being distant from said line at least 200 feet.

The Act of Congress is a grant; not a conveyance of title; but grants a license to occupy *land*. The license is temporary, that is to say, revocable at the will of the grantor, and the licensees are free to occupy or not, according to their own free will.

The Act is not a contract, the license being a mere gratuity without any consideration therefor exacted, received or promised.

The licensees are aliens to whom the United States was not and is not obligated in any way,

except to afford them governmental protection in the enjoyment of such rights as pertain to alien sojourners or denizens.

The Metlakatlans are not by reason of destitution or condition of helplessness objects of charity; they are a thrifty people and as well able to provide for their own support as the majority of citizens are. The policy of our Government is to prohibit immigration of alien paupers and those likely to become a public charge and to deport that class of aliens found in this country. The gate was left open for these people to enter and land was reserved for them to occupy and they are by a special Act of Congress permitted to engage in commerce as masters, pilots and engineers of steam vessels, as a matter of grace, by reason of sentiment favoring them above all other aliens, because they had before emigrating from their native home advanced from a state of savagery and become educated, thrifty, capable and self reliant. Their status in this country is not the same as that of the original occupiers of the soil, who upon being dispossessed were entitled to have reserved for their use some of the lands and permanent rights of fishery and in the natural resources supplying their necessities.

The circumstances and conditions above outlined afford no justification for any strained or latitudinarian construction of the Act of Congress making a reservation of the Annette Islands. The Act is not ambiguous and it is not permissible to construe

it in a way to expand the boundaries prescribed. The descriptive words of the Act indicative of the extent and limitations of the reservation are "body of lands," and "Annette Islands." An island is a tract of land completely surrounded by water, therefore the boundary of an island must be the line of separation between the mass of matter such as earth and rock constituting land and the liquid element surrounding it, called water. The Government surveys of land terminate at the water's edge.

Barney v. Keokuk, 94 U. S. 324-328, 24 L. Ed. 224;

Mann v. Tacoma Land Co., 44 Fed. Rep. 27; affirmed in 153 U. S. 273-286.

Hence, a grant or reservation of a body of land described as an island is a tract having a water boundary; all within the line of separation between the solid and liquid elements constitutes the granted or reserved tract.

The only absolute right appurtenant to land bounded by navigable water is the right of access; the water being a public highway the proprietor of an island or anyone having a license from the proprietor to occupy the same has a special right to use it as a highway the same as any land owner has to insist that a road which affords means of access to his property shall be unobstructed.

Littoral rights, including the rights to erect and maintain wharves and warehouses in aid of commerce, if not in conflict with an asserted paramount

right of the Government, may entitle a shore owner to prohibit others from any occupancy or use of the space between the lines of high and low water, but an assertion by such owner of proprietary or exclusive rights in the waters adjacent to his property has no sanction in the jurisprudence of this country.

This Court in a case appealed from the same court which rendered the decree appealed from herein decided, in effect, that an exclusive right to maintain a fish trap in the navigable rivers of Alaska is not appurtenant to ownership of adjacent land.

Baron v. Alexander, 206 Fed. Rep. 272.

The argument which has been made in behalf of the Government upon an assumption that, because the Metlakatians are to a large extent fishermen and dependent upon industry in that occupation for means of support, Congress must have intended to bestow a bounty in making a reservation for them, therefore, the exclusive right of fishery in all the water surrounding the Annette Islands was granted to them by necessary implication is obviously fallacious, because, such exclusive right is not necessary to the pursuit with beneficial results of their calling as fishermen. They are not restricted to any particular locality or district in which to take fish unless by reason of being aliens they are by law prohibited from taking fish in any waters of Alaska.

The legislators who framed the Act were capable of selecting words and terms sufficient to express clearly the full intention of the enactment and if Congress had intended to grant extraordinary rights in addition to setting apart an island for them to occupy the Act would have been so phrased that the President would not have deemed it necessary or proper to amplify its provisions in a Proclamation.

It is not permissible to interpolate words into a statute in order to change its meaning or broaden its scope.

Newhall v. Sanger, 92 U. S. 765, 23 L. Ed. 769.

NO PROOF SUPPORTING THE CLAIM THAT FOR 25 YEARS THE METLAKATLANS HAVE HELD EXCLUSIVE POSSESSION.

In this connection it is important to observe that the attempt to establish an exclusive right by prescription is a total failure for lack of proof. The nearest approach to competent evidence bearing upon the point is in the affidavit of Edmund Verney, the mayor of Annette Island. He is a Metlakatlan who has made his home upon the island ever since it was made a reservation by the Act of Congress. His testimony on page 58 of the printed record is as follows:

“ * * * ; that the rights of the Indians residing on said Annette Island have always been maintained by them and respected by other

people until the year 1916, when said Alaska Pacific Fisheries, a corporation, have claimed the right to have constructed and maintain a fish-trap at said above-mentioned locations; and this last mentioned instance is the first in which the right to drive and maintain fish traps in defiance of the rights of the United States and of the Indian residents of said Annette Island under said Act of Congress approved Mar. 3, 1891, and of the subsequent proclamation of the President of the United States, dated April 28, 1916, has been attempted."

By this it appears that the first public notice of claimed exclusive rights of fishery was the President's Proclamation and "defiance" thereof was immediate. It will not be denied that the *rights* of the Indians on Annette Island have always been maintained by them and respected by other people; as much might be said, truthfully, concerning *rights* of many people. The same affidavit states some pertinent facts, absolutely disproving adverse possession of the fishing grounds in question, at any time prior to the year 1914. In that year the first fish trap located in water contiguous to Annette Island was put there; and in the year 1915 permits were issued for three traps including one to Charles Brendible. By the uncontradicted testimony of C. A. Burekhardt it is proved that the Brendible trap was erected by this appellant; it paid wages to Brendible for his work in procuring pile timber and in operating the trap; it furnished the other mate-

rials and the pile driver and the trap was operated during the fishing season of 1915 under a partnership agreement whereby the profits if any were to be divided between Brendible and appellant; it took the fish caught in the trap and credited the market price against the cost of the trap and operation. That was, in reality, a fishery projected and managed as a joint enterprise of a white man and a Metlakatla Indian.

Record, pp. 96-105-6.

The Government wanders far afield to find arguments when the descriptive words of the Act are given a free translation synonymous with the word "region" and comparable in vastness with the whole of Alaska, or the Philippine Islands or Porto Rico.

If the judicial sanction which has been given to this preposterous proposition shall be confirmed in the final determination of this cause bureaucratic ambition to confiscate all that has been invested by citizens in the fishing industry in Alaska will be highly elated; it will not be long until all fishing rights will be dominated by the leasing system, ostensibly, for the benefit of Indians, but really for the advantage of a monopolistic trust; and graft and scandal will be the final outcome.

If in framing the Act Congress could have anticipated such extraordinary presumption; it is not probable that words to describe and limit the reservation with accuracy and precision, better or more apt than the words of the Act would have been se-

lected. With the object in view of granting a mere privilege to occupy temporarily a location adequate for a comparatively small community, instead of making a reservation comprising a vast region or grand geographical division of country, Congress prescribed the boundaries in the words of the Act, viz.:

“the body of lands known as Annette Islands, situated in Alexander Archipelago in South-eastern Alaska, on the north side of Dixon’s Entrance.”

So much, and only so much, was segregated from the Territory of Alaska for the particular use specified.

PRECEDENTS.

It is contrary to the policy, and a variance from the practice of the Government to grant monopolistic privileges or exclusive rights in public waters; and in construing Congressional grants of *land*, the courts have consistently held that the proprietary rights of grantees of land abutting upon shores of navigable water, terminate at the line of ordinary high water. A striking instance is in the decision of the Supreme Court construing the Oregon Donation Law in the case of *Shively v. Bowlby*, 152 U. S. 1-58, 14 Sup. Ct. Rep. 548, 38 L. Ed. 331.

The exhaustive opinion in that case furnishes the best guide for the interpretation of the Annette Island reservation act. There is no history connected with legislation that is more interesting and

instructive than the history of the old Oregon country. "Old Oregon country" is a phrase descriptive of the whole region comprising approximately 300,000 square miles of territory embracing the present States of Oregon, Washington, Idaho, and all of Wyoming and Montana west of the Rocky Mountains, and was a subject of contention between our government and Great Britain. The country was in the grasp of the Hudson's Bay Company whose policy was to hold it as long as possible as a game preserve. It was wrested from the domination of that corporation by emigrants from Eastern states, who thereby rendered a service of incalculable value to our nation and to humanity. After the international question had been settled by treaty in the year 1846 Congress to reward the pioneers and encourage them in their undertakings as founders of commonwealths, enacted the Donation Law, conferring rights to the designated beneficiaries to acquire titles to specified quantities of land. The objects of the law were beneficent, its provisions were contractual and for adequate considerations in national benefits received and to be rendered, by developing the wealth of the country. The pioneers were empire builders, and the use of the shores and waters contiguous to the lands selected by them was essential to the accomplishment of their purposes, especially for the erection of wharves and buildings as aids to commerce. These conditions afforded cogent reasons for application of the rule of liberal construction of the law with

respect to shore rights of the donees made especially valuable by their improvements for public convenience. The decision in the case cited, however, adhered rigidly to the prevailing rule for construing Congressional grants of land which limits the definition of the word "land" within its common and ordinary meaning, so that in the application of the law to a tract bounded by the shore of navigable water, the proprietary rights of the grantee terminate at the line of ordinary high water, and does not include exclusive rights in the shore or contiguous waters.

No claim to shore rights, nor to space between the lines of high water and low water is contested by the appellant; the issue is clean cut and involves only a claimed *exclusive* right of fishery offshore. The rule for construing Congressional grants of land, which limits such grants to upland, is applicable to this case, because it precludes all claims to granted rights, by implication, to territory exterior to a water boundary, which, in cases of grants reaching to navigable water, is the line of ordinary high water. That rule, though broader than our contention, supports it. If it shall be deemed proper to assume that the reserve includes the whole of Annette Island including its shore, and by reason of the plural word "Islands" to include also the small adjacent islets and the shores thereof, the case may rest on that assumption, and still the trap will not be an encroachment upon the reserve. An exclusive right of fishery offshore is different from

a right appertaining to land, so different in essence, so extraordinary, and so unnecessary to the beneficial use of land, that it does not come within the category of rights appurtenant to the title to real estate.

Baron v. Alexander, 206 Fed. Rep. 272.

“From the wild and wandering nature of fish they are not, nor can they be, the subject of ownership in running streams, * * * in such streams no one, not even the owner of the soil over which the stream runs, owns the fish therein.”

Parker v. People, 111 Illinois 588.

A body of land is not an area of water, and an island is distinct from the water surrounding it. The act is specific, making a reserve of the “body of lands known as Annette Islands.” There can be no addition of space exterior to the reserve, nor of rights in such exterior space by mere implication, without disregarding the plain significance of the words “lands” and “Islands” and interpolating, by supposed intendment, other words to express the legislative will to include exterior space of unlimited extent.

What does the act reserve? Answer—A body of lands.

What particular body of lands? Answer—Annette Islands.

Sentimental construction, rather than legal interpretation of the Act, is what the Government con-

tends for, as being requisite to fulfill an imaginary promise of the Great White Father to confiding children.

The relevant fact is that these Indians were led by a courageous white man to immigrate to, and occupy Annette Island, without any invitation, or promise; the idea of their being deceived or trapped is ridiculous. Previous to their coming the plan to set apart Annette Island as a reservation for them, by an executive order, had been disapproved, as illegal, by the Attorney General of the United States; and it was not until three years after their settlement on the island that Congress passed the Act. Tameness is not characteristic of Indians either before or after they have been educated in the ways of white people, and a religious community having enough independence to revolt against the authority of a bishop could never be caught in a trap that had to be constructed while they were waiting to get into it.

In one of its most recent decisions the Supreme Court held that even a reservation of fishing and hunting rights contained in a conveyance of land, made by Indians, may not be so construed as to vest in the grantors exclusive rights, nor to include, by implication, rights not contemplated by the parties at the time of the transaction.

New York ex rel. Kennedy v. Becker, U. S. Adv. Ops. 1915, p. 705; — — Sup. Ct. Rep. — —, — — U. S. — —, 60 L. E. — —

THIS CASE AS ONE OF FIRST IMPRESSIONS.

As a reason for disregarding the adjudicated cases as precedents of controlling authority in this case, it has been contended that the Annette Island Reservation Act is a thing of its own kind. It is true that the Act is unique and being so regarded the decision called for appeals to the conscience of a court of equity; mere sentiment should not outweigh sense and justice. The Government in this case demands a sacrifice of the appellant's property and rights acquired legitimately in the prosecution of an industry beneficial to mankind in general, and therefore, deserving of protection in a court of equity. Citizens, upon whom the Government must depend to fight and pay taxes to defend and support it, are entitled to have their rights respected. Confiscation of the property of citizens for the mere purpose of benevolence to aliens is what representatives of the Government in this case are demanding. The demand under the guise of a benevolent purpose is nothing less than rank injustice intolerable in a court of equity. In a case of first impressions, without a justifiable cause for an unusual or strained construction of a statute which is free from ambiguity and, therefore, not a subject calling for application of mere theories for its interpretation, the demand is shameful rather than meritorious.

The Act is special, for a special object, and that object was not to assume a burden to provide means of support for indigent foreigners; any difference

between the reserve and other Indian reservations leaves the Act in the class of special statutes, and subject to the rules applicable for interpretation of special statutes. Every word therein must be deemed to have been selected to express accurately the legislative will, so that what is expressed negatives all that might be implied. *Expressum facit cessare tacitum.*

THE ACT COUPLED WITH THE PROCLAMATION.

Proposition No. 3 above set forth is a traverse of Proposition No. 2, therefore both will be discussed connectedly.

There is in the second proposition, impliedly, a double admission; it amounts to an admission that the Act alone is insufficient to support the contention that the reservation includes water space surrounding it, or to constitute a grant of exclusive rights of fishery. There is a further implied admission that the proclamation does not of itself create a reservation, nor exclusive rights of fishery. The two implied admissions being the logical product of the copulative conjunction. However, without these implied admissions the only conclusion of the whole matter must be that, neither the Act by itself, the Proclamation by itself, nor the two coupled together transform the substance of water into land, nor warrant an assumption that the boundaries of a grant prescribed by an Act of Congress are so expansible

as to include rights and benefits in the use of contiguous waters, merely because the grant would be more valuable with such rights and benefits appended.

The President is not authorized by the Constitution, or any law, to appropriate any part of the public domain, either land or water, to make a reservation for the benefit and use of Indians who are *aliens*. The whole argument attempting to maintain the validity of this Proclamation is fallacious for the reason that it leaves out of consideration the very substantial difference between the obligations of our Government towards Indians whose homes in our country are theirs by birthright and mere gratuitous benevolence towards Indian immigrants. All the authorities supporting the proposition that a reservation for Indians may be set apart by an Act of Congress, by a treaty, or by an executive order have reference to reservations for Indians who have natural rights to inhabit this country, and who are deemed to be wards of the nation, and subject to laws for their benefit to be executed by the executive branch of the Government. The Metlakatlangs have no such natural right, nor do they have the status of natives under guardianship. The law on this subject is clearly and fully set forth in the opinion by Attorney General Garland, dated February 28, 1887, 18 Opinions of Attorney Generals, page 557.

That opinion is based on fundamental principles and it is sound, now, as it was when President Cleve-

land heeded the advice of the eminent attorney general who gave it. Those principles deny authority in the executive branch of the government to grant special privileges to aliens, derogatory to rights of citizens. An executive order making an original reserve of unappropriated land for temporary use would be less harmful and, therefore, less obnoxious to the supreme law of this nation, than a proclamation extending to new territory exclusive rights, involving confiscation of property and deprivation of existing rights of citizens.

John Marshall, the great Chief Justice, made the announcement that ours is a government of laws and not a government of men. The President is not vested with dictatorial power so that he may take from all the people that which belongs to all the people, and bestow it as a mere gift to whomsoever he will. The boast of Americans that ours is the best government ever designed by man is a vain boast, unless it be true that ours is better than popular governments which preceded it, because we have a written Constitution which is the paramount law of the land, which regulates and controls the operations of the Government as a perfect machine whose parts work in combination, but separately, in a way to check excesses in exercise of authority. The Constitution distributes the powers of the government between the three co-ordinate branches and every attempt of the executive branch to legislate, either by proclamation as an original measure, or by adding to or taking away from the enactments of

Congress, is an unlawful usurpation and, therefore, null and void.

Williamson v. United States, 207 U. S. 425.
52 L. Ed. 278, 28 Sup. Ct. Rep. 163.

These considerations are especially pertinent in view of a reference made in the memorandum decision of the Court below to the provisions of Article IV, Section 3 of the Constitution. The Court said truly that:

“The Congress, representing the people of the United States, has under the Constitution the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.”

This is in terms an express grant of power *to Congress*, to be exercised only in the mode required for the enactment of laws. The President is not *Congress*, and we wish to emphasize the point that every attempt by a proclamation to exercise power vested only *in Congress*, is an unlawful usurpation.

Congress alone has power to make rules and regulations respecting Alaska, as territory of the United States, and its governmental power is to be exercised in view of the purpose for which our government may lawfully acquire territory, that is to say, with a view to the erection of new states to enter the Union on an equal footing with the original states. Congress has declared the status of Alaska to be territory eligible to become one or more states

of the Union which will have governmental and proprietary rights with respect to its waters.

Act of May 14, 1898, 30 U. S. Stat. 409, 1 F. S. A. 45.

Comp. Laws of Alaska, 1913, Sec. 92.

There are precedents for proclamations and executive orders which if valid would be legislative in effect; there may be instances in which such usurpations of legislative power have not been condemned by the judiciary. On the other hand the courts have usually been sensitive of any derangement of governmental machinery in this particular and have vindicated the Constitution by nullifying executive orders which encroach upon legislative power.

A notable instance is the decision of the Supreme Court in the case of *Nelson v. Northern Pacific Railway Company*, 188 U. S. 108; Sup. Ct. Rep. Vol. 23, p. 302, 47 L. Ed. 406. Nelson was a settler of public land of the United States, claiming part of an odd-numbered section within the limits of the land grant made to the Northern Pacific Railroad Company. His right to acquire the title was contested and had been rejected by the officers of the land department for the reason that at the time of initiating his settlement the section, though not within the limits of the grant as fixed by any previous definite location of the line of the Northern Pacific Railroad, was within limits having reference to preliminary designations of contemplated locations of the railroad. Before the actual final survey

and definite location of the railroad, it had been the practice to file in the General Land Office maps of the general route made from surveys indicating lines which might be ultimately selected, and it was deemed necessary to prohibit settlements and filings on odd-numbered sections which might ultimately be found to be within the limits of the grant, in order to prevent diminution of the grant by the vesting of rights prior to the definite location of the railroad, and for that reason executive orders were issued from time to time withholding from settlement thereon odd-numbered sections. Then it was not Metlakatans but a railroad corporation that was the beneficiary of the Government's bounty and then, as now, the executive was moved to make the grant better than the wisdom of Congress had prescribed, and in utter disregard of the rights of citizens the odd-numbered sections within the public domain extending from Lake Superior to Puget Sound and Portland, Oregon, were reserved until such time as the railroad officials might find it convenient to make their definite selections of a route. Nelson was obstinate in holding on to his claim and improved it as a farm, and the Land Office afterwards issued a patent to the Railroad Company conveying a title including Nelson's improvements. The Supreme Court, however, awarded the land to him for the reason that his right was initiated anterior to the time when the railroad grant attached to the section in which his claim was located, and held the preliminary withdrawals of public land for the bene-

fit of the railroad, by executive orders, to be unauthorized and, therefore, null and void.

RULES, REGULATIONS AND RESTRICTIONS TO BE PRESCRIBED.

The Act provides that the reservation shall be held and used by the licensees in common,

“under such rules and regulations, and subject to such restrictions, as may be prescribed from time to time by the Secretary of the Interior.”

Manifestly this last clause of the Act does not confer legislative power upon the executive branch of the government to amend the Act by any enlargement, extension, or curtailment of the area reserved; or by adding thereto a grant of an extraordinary exclusive right of fishery in water not within that area. What does the Act say shall be—under rules and regulations and subject to restrictions to be prescribed?

The answer to that question is obvious; the implied authority to prescribe rules, regulations and *restrictions* is governed by the preceding words—“to be held and used by them in common”: and by the Constitution of the United States, which distributes the powers of the government between its three branches, so that Congress may not in any instance delegate power to the executive branch to

prescribe rules or regulations effective to amend, alter, or change the meaning of statutes.

Williamson v. United States, 207 U. S. 425,
28 Sup. Ct. Rep. 163, 52 L. Ed. 278.

The Proclamation contains in its preamble the following recitals:

“Whereas the Secretary of the Interior, with a view to assisting the Metlakatlans to self support, has decided to place in operation a cannery on Annette Island; and whereas it is therefore necessary that the fishery in the waters contiguous to the hereinafter described group comprising the Annette Islands be reserved for the purpose of supplying fish and other aquatic products for said cannery.”

Here we have a declaration of intention on the part of the Secretary of the Interior to undertake an industrial enterprise to aid the Metlakatlans to self support, coupled with the further declaration that for the success of the proposed enterprise a reservation of the fishery in question is necessary. If our government is to engage in such an enterprise to assist the needy there are plenty of American citizens whose needs are more urgent than the Metlakatlans. The government was ordained and established and is being supported by its citizens for their own welfare and benefit, and its duty is to them, insofar as it may be deemed to have a duty to assist the needy. It has no more right to employ

its energies and resources for the benefit of Metlakatlangs than it would have to do as much for a colony of Belgians, or afflicted people in any foreign country who may seek betterment of conditions by voluntarily immigrating to and occupying a vacant island in Alaska. There are plenty of such communities in districts where war, famine and floods have inflicted desolation and heart-rending misery. The Metlakatlangs, however, are not in a situation of distress entitling them to appeal for charity; they are as well able to support themselves in comfort as the majority of American citizens are. Our government if wisely administered would be just before being generous, or, if generous, would look for objects among its own citizens more in need of its benefactions.

“If any provide not for his own, and especially for those of his own house, he hath denied the faith, and is worse than an infidel.”
I Timothy 5-8.

The assigned reason for the Proclamation is untrue because the Secretary of the Interior is not only unauthorized to engage in such an enterprise but unable to do so for lack of necessary capital. For the construction and equipment of a cannery and necessary materials for the business of canning salmon a preliminary outlay of a large amount of money is absolutely necessary and until Congress makes an appropriation for the purpose the Secretary of the Interior cannot command a dollar for such purpose. It is equally untrue that any reser-

vation of a fishery is essential to the operation of a cannery. There are many canneries in Alaska which have been operated successfully for many years without having as yet broken down the principle that fish in the sea are nature's bounty to which all the people have equal rights.

NO PROOF OF THE DECLARED INTENTION CONTAINED IN THE PRESIDENT'S PROCLAMATION.

If it were true that the Secretary of the Interior had actually decided to operate a cannery the fact of such decision should have been proved in support of the complaint in this case, but there is no such proof; the nearest approach to evidence of the intention is to be found in the affidavit of D. Noll (Record, p. 60), in which he says:

“That the plaintiff has now made further arrangements for the upbuilding of said fishing industry for the benefit of said Metlakatlangs and has encouraged them to drive traps for the purpose of catching fish * * * .

The defendant for the purpose, among others, of thwarting the plaintiff in its said plans and arrangements and annoying, harassing and injuring the plaintiff therein and destroying said scheme and injuring said Metlakatlangs has driven a fish trap on the west coast of said reservation at or near Cedar Point.”

In other affidavits there are similar hints of arrangements, plans and a scheme, but nothing nearer

definite proof of facts indicating the real intention of the Secretary of the Interior with respect to a fish cannery.

There is a reason for this withholding of evidence disclosing the real *intention, plan, arrangement and scheme* which are almost, but not entirely hidden. The thing decided upon by the Secretary of the Interior was not the operation of a cannery but the granting of a lease to a man named P. E. Harris, who is not a Metlakatlan, and granting to him a monopolistic right of fishery in the proposed reserve. A partial disclosure is in the affidavit of Harris on page 55 of the printed Record and in the testimony of C. A. Burkhardt, on his cross-examination. Record, pp. 116-118. The *scheme* is more fully revealed in a speech by Honorable James Wickersham, representing Alaska in Congress, as its delegate, printed in the Congressional Record under date of July 25, 1916. We quote from a pamphlet issued from the government printing press:

“Quite recently Secretary Lane caused the reservation of 3000 feet in area around Annette Island, excluded all Alaskans from fishing in the area, and leased the privilege of that fishery to a non-resident fish trust employee, giving him a written contract in the name of the United States for a special fishing privilege there for five years. If Alaskan waters are thus subject to the Secretary’s contracts the fisheries of Alaska may next be leased to the Fish Trust and all Alaskans excluded.”

The Proclamation is the first and only public assertion of exclusive rights of fishery in the public waters of Alaska. It was not issued until after the appellant located and constructed its fish trap, involving an investment of a large amount of money, with due observance of the fishing laws enacted by Congress.

The claim that appellant had foreknowledge of an intention to make a reserve of fishing ground including the location of its fish trap, by an executive edict, is based on nothing except the affidavit of Harris (Record, p. 55), alleging an admission made to him by Tom Heckman, at an unremembered date,

“that he then knew about the lease, and of the Proclamation of the government about to be published in regard thereto, and that his said Company also knew thereof.”

Before accepting an *ex parte* affidavit as proof of such an extraordinary fact the Court should have information as to how a mere intention of the President could have leaked out, or have been communicated to a man at Ketchikan, not having any confidential relationship with the President or any member of his Cabinet. The evidence in the record is too flimsy to support a finding of any material fact; and the finding which the Court below did make (Record, p. 189), that Heckman made such statement to Harris, prior to the issuance of the Proclamation, is of no importance whatever, because it falls far short of proving that the appellant challenged a contest with the government by placing

a trap, where its right to do so was denied, or to be disputed. A finding reaching to that point was not made, and could not be made, consistently with the evidence, for the reason that uncontradicted evidence proves that immediately previous to driving the trap appellant obtained information through its representative at Washington, D. C., to the effect that no exclusive right of fishery would be granted in or by the contemplated lease to Harris, and that appellant did not have notice or any knowledge of or concerning the Proclamation prior to May 4th, 1916, on which date a telegraphic notice was received from an Assistant Secretary of the Interior. Testimony of C. A. Burckhardt, Record, pp. 87-118-119.

Since Magna Charta control and regulation of fishing rights has been, and is, by the common law of England a legislative function; Crown Grants of exclusive rights being expressly forbidden, and in the jurisprudence of this country based upon the common law the right of fishery in public waters belongs to all the people, controlled and regulated within the States of the Union by statutes enacted by their respective legislatures.

Gould on Waters, 3rd ed., Sections 1, 2, 30, 32, 34, 36, 39, 189.

McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248.

Manchester v. Massachusetts, 139 U. S. 259-260, 35 L. E. 159, 11 Sup. Ct. Rep. 559.

United States v. Shauver, 214 Fed. Rep. 157.

United States v. McCullagh, 221 Fed. Rep.
292.

The power to govern the territories is vested in Congress.

National Bank v. County of Yankton, 101 U.
S. 133, 25 L. Ed. 1046; 1 Kent's Comm.
Star. p. 384.

This means that the power of the government is to be exercised by Congress in like manner as governmental power is exercised by the states within their territorial boundaries, and as to matters subject to regulation by legislative enactment Congress must act. The President cannot govern the territories by proclamations.

We respectfully submit to this Court that the Proclamation is an absolute nullity for three good and sufficient reasons, viz.:

1. Issuance thereof was an attempted exercise of power not vested in the President.
2. The assigned reasons for the Proclamation are insufficient because based upon false pretenses.
3. Its enforcement will work rank injustice by the confiscation of property legitimately acquired in the pursuit of a lawful business in a lawful manner.

NO EQUITY IN THE BILL.

The Proclamation which the decree appealed from would enforce, is an unrighteous attempt to assume dictatorial power and use it oppressively to

crush an independent enterprise standing in the way of monopolists avaricious to absorb all of the fishing rights in Alaska. The assigned reason for its issuance is not to foster an industry beneficial to the nation, nor to conserve natural resources by protection of salmon from extermination, but to stimulate activity of inhabitants of Annette Island that more fish may be caught by them. Therefore, the case is not grounded in equity. On the other hand the defense pleaded and proved is meritorious and complete. For maintenance of the great principle of Liberty Regulated by Law citizens must ever struggle; this case proves that the most dangerous enemies of the Constitution are those who in disregard of official duty work insidiously to undermine its foundation. We sincerely and earnestly claim that the appellant appears in the attitude of a contender for a fundamental principle, as well as defender of a right; in resisting confiscation it is performing a patriotic service defending the Constitution of the United States. To support and defend the Constitution is an obligation to be observed, and of first importance in the decision of this case.

C. H. HANFORD,
Solicitor for Appellant.

APPENDIX.

REFERENCES TO STATUTES.

For convenience the Statutes to which the Court may refer are here cited in a group.

1. Act reserving Annette Island for the Metlakatlangs—Sec. 15 of Act to repeal Timber Culture Law. March 3, 1891, 26 U. S. Stat. 1101.
2. Declaratory Law, defining status of Alaska as a Territory and prospective State and defining Navigable Waters therein. May 14, 1898—30 U. S. Stat. 409—1 F. S. A. 45—Compiled Laws of Alaska, 1913, Sec. 92.
3. Fisheries Law of Alaska, June 26, 1906. 34 U. S. Stat. 478—Pierce's Fed. Code, Sec. 4086—U. S. Comp. Stat. Supp. 1911, 1228.
4. Jurisdiction of Department of Commerce, including Fisheries, Feb. 14, 1903—32 U. S. Stat. 825—Pierce's Fed. Code, Sec. 3970—U. S. Comp. Stat. Supp. 1911, 115—10 F. S. A. 58.
5. Licensing of Metlakatlangs as Masters, Pilots and Engineers, March 4, 1907—34 U. S. Stat. 1411—Comp. Laws of Alaska 1913, Sec. 24.

LIST OF AUTHORITIES CITED.

- Barney v. Keokuk*, 94 U. S. 324-328, 24 L. Ed. 224.
Baron v. Alexander, 206 Fed. Rep. 272.
Manchester v. Massachusetts, 139 U. S. 259, 35 L. Ed. 159, 11 Sup. Ct. 559.
McCready v. Virginia, 94 U. S. 391, 24 L. Ed. 248.
Nelson v. N. P. R. Co., 188 U. S. 108, 47 L. Ed. 406, 23 Sup. Ct. 302.
Newhall v. Sanger, 92 U. S. 765, 23 L. Ed. 769.
National Bank v. County of Yankton, 101 U. S. 133, 25 L. E. 1046.
New York v. Kennedy, U. S. Adv. Ops. 1915, 705.
Parker v. People, 111 Illinois, 588.
Shively v. Bowlby, 152 U. S. 1-58, 38 L. E. 331, 14 Sup. Ct. 548.
United States v. McCullagh, 221 Fed. Rep. 292.
United States v. Shauver, 214 Fed. Rep. 157.
Williamson v. United States, 207 U. S. 425, 52 L. E. 278, 28 Sup. Ct. 163.
 I Kents' Commentaries, Star page 384.
 Gould on Waters, 3rd Ed., Sections 1, 2, 30, 32, 34, 36, 39, 189.

No. 2828

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACIFIC FISHERIES,
a Corporation, its Officers, Agents,
Employes, and all persons acting
by, through or under or in privity
with it, *Appellant,*

VS.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

JAMES A. SMISER,
United States Attorney,

JNO. J. REAGAN,
Asst. U. S. Attorney,
For the District of Alaska, Division No. 1.

JOHN W. PRESTON,
United States Attorney,

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For the Northern District of California,
Attorneys for Appellee.

Filed this.....day of October, 1916.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

No. 2828

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ALASKA PACIFIC FISHERIES,
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VS.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

STATEMENT

The record herein shows that on the 3rd of March, 1891, the Annette Islands, situated in Alexander Archipelago, Southeastern Alaska, were set aside by an Act of Congress of the United States as a reserve for the use of the Metlakahtla Indians and such other natives of Alaska as might join them thereon. These Indians had located on these islands a couple of years previously, having emigrated from British Columbia. These islands consisted of one main island, called Annette Island, and several smaller islands, and they and the surrounding waters are a part of the public domain of the United States.

See 26 Stats. p. 1101.

Ever since the date of the Act aforesaid the Department of the Interior of the United States has had supervision over the reserve thus created and over the inhabitants thereof, and Congress has appropriated money from time to time for the purpose of improving the condition of these people. The work of educating them and training them in industrial pursuits was left for many years mainly in charge of one William Duncan, a former lay missionary of the Church of England; and under his guidance considerable advancement had been made by them, all of the Indians acquiring more or less proficiency in the rudimental branches of learning and considerable proficiency in the use of tools and in industrial pursuits generally. These people have built upon the main island a town called Metlakahla, have built and maintained a school, built and maintained a water system, built and maintained a fish cannery and a saw mill, and they have built and supported one of the largest churches in Alaska. They have advanced from a state of savagery to one of considerable civilization. They have to a certain extent, under a system approved by the Secretary of the Interior, governed themselves, and by ordinances of their council they have provided for health and fire protection and for the general welfare of the community.

About a half dozen years prior to the commencement of this action the younger and more progressive members of the community began to insist upon better educational facilities than could be

had under the management of said Duncan and the Interior Department caused a government school to be erected on the main island at the village of Metlakahtla and furnished therefor a government teacher. This move caused some friction between the Government and nearly all of the Indians on the one side, and said Duncan and a few of the older Indians on the other side, which continued until the Department of the Interior decided to assume exclusive control of all the material interests of the Indians living on the reserve, leaving only the supervision of spiritual affairs in the charge of said Duncan. With a view to assisting the Metlakahtlans to self-support and to resume the operation of the cannery (which on account of the friction before mentioned had been closed for several years), the Interior Department effected an arrangement with one P. E. Harris to manage the operation of the cannery, said Harris being a competent cannery manager who operated a cannery of his own elsewhere, to the end that in due course of time the operatives of said cannery would become fully trained in all branches of the fish-canning business, so that they would be competent to conduct this line of industry themselves. This arrangement was made in March or April of 1916.

Ever since the passage of the Act of Congress setting aside the reserve—a period of upwards of twenty-five years—no attempts had been made by anybody to encroach upon the use by the said Indians of these islands which comprise the reserve or the waters adjacent thereto.

That in furtherance of the design of the Government to have the cannery in question operated and to procure the necessary fish therefor and to prevent any further possible interference or intrusion by others in the waters surrounding this reserve, the President of the United States on the 28th day of April, 1916, issued his proclamation, proclaiming that the waters within three thousand feet from the shore at mean low tide of the said islands were thereby reserved for the benefit of the Metlakahtlans and such other Alaskan natives as have joined or may join them in residence on these islands, and expressly warning all unauthorized persons not to fish in or use any of the waters therein mentioned.

That the appellant through its president, Charles Burkhardt, knowing of the intended arrangement between the Government and said Harris, began a correspondence with the Secretary of the Interior in the month of March, 1916, in regard thereto for the purpose of ascertaining what was being done in the premises, and was advised that no fishing rights would be granted anybody in these waters.

On the 4th of May, 1916, said Burkhardt received a communication from the Secretary of the Interior, notifying him of the proclamation of the President above mentioned, and the superintendent of the appellant, Mr. T. A. Heckman, some time after the first of April, 1916, in a conversation with said Harris told Harris that he, Heckman, knew about the arrangement made by the Government with him, Harris, and that said proclamation was about to be

issued, but that he, Heckman, had orders nevertheless from the appellant to construct a fish trap within the waters in question, and asked Harris what he intended to do about it. That appellant's acts in intruding upon the reserve and constructing said trap were without permission of any kind.

That the appellant, acting through its superintendent, T. A. Heckman, had by about the 19th of April, 1916, gotten the piling for the fish trap mentioned above driven in the waters of the reservation and completed the trap by capping the same and placing the webbing thereon some time after the issuance of the proclamation, to-wit, about the 21st or 22nd of May, 1916.

That after said arrangement was made with Mr. Harris for the operation of the cannery and after the commencement of the correspondence between the president of the appellant and the Secretary of the Interior, the cannery then upon the reserve was destroyed by an incendiary fire. That arrangements were at once entered into for the building of another cannery on the reserve.

That this suit was commenced on the first of June, 1916, and after the process had been served the appellant intruded upon the reserve and attempted to procure some of the natives to execute an affidavit to the effect that they, the inhabitants of the reservation, would be in no way injured by permitting the appellant to intrude upon the reser-

vation and to operate said trap, this having a tendency to reagitate the friction between the Government and a majority of the natives on the one side, and Duncan and a few of the older natives on the other side, which had been in progress for half a dozen years and which had after long and patient effort on the part of the Government been quieted.

The appellee in this suit prayed for an injunction requiring the removal of said trap from the waters of the reserve and enjoining appellant from trespassing on said land and waters mentioned and from fishing in said waters. The suit was prosecuted to final decree and the prayer of the appellee was granted, from which decree the appellant appeals.

ARGUMENT

The contention of the appellant is that in passing the Act creating the reserve Congress did not reserve any of the waters surrounding the islands beyond the line of mean low tide, and also that the proclamation of the President is without authority.

It is not necessary to cite authorities on the proposition that a statute must be construed with reference to the object intended to be accomplished by it; and that the meaning and application of the law may be ascertained by resort to the intention of the Legislature; that it should have a rational and sensible construction; that the spirit and reason of the law will prevail; and that in order to ascertain these objects it is proper to consider the occasion and necessity.

Shulthis vs. MacDougal, 162 Fed. 331

(affirmed in 170 Fed. 529);

Cardinal vs. Smith, 5 Fed. Cas. 2395;

Holy Trinity Church vs. United States, 143

U. S. 457;

Williamson vs. Leland, 2 Pet. 627;

Interstate Drainage Co. vs. Freeborn Co., 158

Fed. 270;

United States vs. Musgrave, 160 Fed. 700;

United States vs. 99 Diamonds, 139 Fed. 961.

It is presumed also that Congress acted with full information in regard to the subject matter.

State vs. Higgins, 121 Ia. 19, 95 N. W. 244;

State vs. Hardin, 62 W. V. 313, 58 S. E. 715.

Congress must be held to know what is a matter of common knowledge and what everybody else knew at the time of the passage of the Act creating the reserve, March 3, 1891, that these Indians are not tillers of the soil; that they do not procure food from tilling the soil; that they live by hunting and fishing. Congress must also be held to have known what everybody else then knew, that there was little or no agricultural land on these islands or in fact in all Southeastern Alaska, and that these Indians could not survive without the products of the sea for food. Congress must also have known that even the hunting on the islands so small in area as these

would be exterminated within a very short period of time and that the only means of subsistence would be from fishing. Therefore, Congress must be held to have made this reservation for the use of these Indians "to be held and used by them" for the purpose and in the manner that Indians ordinarily hold and use lands, namely, for the purposes of habitation and procuring food, by hunting and fishing, and must have intended to reserve for the use of the Indians the food supplies obtained from hunting and fishing incident to the islands; and this must be necessarily included within the scope and meaning of the Act.

Furthermore, the construction placed upon the statute by the officers whose duty it is to execute it, is entitled to great consideration.

United States vs. Cerecedo Hermanos y Co.,
209 U. S. 337.

In addition to the above, this is the construction that has been placed upon the Act by everyone, for ever since the passage of the Act making this reserve, a period of upwards of twenty-five years, no attempt has ever made by anybody to encroach upon the use by the Indians of these islands or of the waters adjacent thereto.

The Act creating the reserve states that the islands are to be used by the Indians "under such rules and regulations and subject to such restrictions as may be prescribed from time to time by the Sec-

retary of the Interior.” After the passage of the Act the Secretary of the Interior made certain rules, regulations and restrictions as he was authorized to do and they became by the terms of the Act a part of the Act, and these rules, regulations and restrictions became and were binding upon all persons whatsoever and not on the Indians alone. These rules, regulations and restrictions were promulgated by the Secretary in order that the design of Congress may be effected according to its true intent and purpose and, as stated, became a part of the Act itself, and are to be enforced as part of the Act by the executive authority.

All executive power of the Government is vested by the Constitution in the President.

Constitution, Art. II.

Section 465 of the Revised Statutes of the United States provides that “the President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any Act relating to Indian affairs.”

Fed. Stat. Ann. 339.

The act of the President, therefore, in issuing the proclamation in question here is an act of executive authority fully warranted by the law and is a reasonable exercise of executive power.

In addition to what is stated above, the Act of Congress set aside “the body of lands known as

Annette Islands." It will be noted that the language of the Act is "lands" and "islands", thus indicating a group of islands situated in the Archipelago. It would be idle to say, and no one could seriously contend, that there was no reservation of the waters connecting and surrounding these islands. These islands and these waters being of the public domain of the United States, Congress had a perfect right to do with them as it saw fit, having inherited all the prerogatives and powers of the British Government and its Parliament, and has the right to make reservations of land in the public domain, and has the right to grant exclusive rights of fisheries, and even to close navigable waters.

2 Farnham on Waters, Sec. 370, p. 1373;

Gould on Waters, 3rd Ed., Sec. 189.

As representatives of the people, Congress has the Constitutional power to dispose of and to make all needful rules and regulations respecting the territory and other property belonging to the United States.

Constitution, Art. IV, Sec. 3.

The Congress having made the reserve by the Act of March 3, 1891, the President of the United States may modify the reservation by reducing or enlarging it.

Grisar vs. McDowell, 6 Wall. 363.

And in case Congress had not already done so, the President had power, if he saw fit, to enlarge the

reserve by including certain of the waters surrounding it, or to make the water boundaries definite, and the validity of his act would not be affected by the fact, if it were a fact, that the description in the original Act was defective or indefinite.

Grisar vs. McDowell, 6 Wall. 363.

Power of President to Create Reserve.

A reservation of the public lands may be made by Congress, or by the treaty-making power, or by order of the President.

From an early period it has been the practice of the President to order from time to time, as the exigencies of the public service require, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

Grisar vs. McDowell, 6 Wall. 381.

“An Indian reservation is part of the public domain set apart by the proper authority for the use and occupation of a tribe or tribes of Indians. It may be set apart by an Act of Congress, by a treaty, or by an executive order.”

Wolcott vs. Des Moines, 5 Wall. 681.

Grisar vs. McDowell, 6 Wall. 363.

United States vs. Payne, 8 Fed. 883.

The authority of the President in this respect is recognized by numerous Acts of Congress.

Grisar vs. McDowell, 6 Wall. 363.

And by the decisions of the Courts.

Onderdock vs. San Francisco, 75 Calif. 534;
Florida T. I. Co. vs. Bigalsky, 44 Fla. 771;
Nevada Ditch Co. vs. Bennett, 30 Oreg. 59;
Apis vs. United States, 88 Fed. 931;
United States vs. Payne, 8 Fed. 833.

Congress has conferred upon the President the power to make a reservation of public land for certain purposes.

Spaulding vs. Chandler, 160 U. S. 394.
United States vs. Blendauer, 128 Fed. 910.

The President may effect a reservation of public land by proclamation.

Russian Amer. Packing Co. vs. U. S.,
 199 U. S. 570;
Holmes vs. United States, 118 Fed. 995;
C. Doll v. Meador, 16 Calif. 295;
Jones vs. Callvert, 73 Pac. 701.

Where the President issues a proclamation reserving certain lands and warns all persons to depart therefrom, any rights previously acquired by settlers are thereby terminated.

Russian Amer. Pkg. Co. vs. U. S.,
 199 U. S. 570;

Section 2258 of the Revised Statutes provides that "lands included in any reservation by any treaty,

law or proclamation of the President for any purpose" are expressly declared not to be subject to the rights of pre-emption.

Congress recognized the right of the President to make reservations of public lands by Act of September 4, 1841, entitled "An Act to appropriate the proceeds of sales of public lands and to grant pre-emption rights." (9 Stats. 77.)

Woolsey vs. Chapman, 101 U. S. 769.

By an Act of Congress of the year 1830, all lands were exempted from pre-emption which were reserved by order of the President.

By an Act of Congress of June 19, 1834, Congress revived the Act of May 29, 1830, which Act provided "No entry or sale of lands shall be made under the provisions of the Act which shall have been reserved for the use of the United States or either of the several States or which is reserved from sale by Act of Congress or by order of the President or which may have been appropriated for any purpose whatsoever.

Wilcox vs. Jackson, 13 Pet. 498.

In the case of *Woolsey vs. Chapman*, 101 U. S. at page 769, construing the Act of May 15, 1856, in aid of the construction of railroads (11 Stats. 9), this language was used:

"Provided further, that any and all lands heretofore reserved to the United States by any Act of Congress or in any other manner by

competent authority for the purpose of aiding in any object of internal improvement or for any other purpose whatsoever, be and the same are hereby reserved to the United States."

The lands referred to above were withdrawn from private entry notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such withdrawal.

In *Wolcott vs. Des Moines*, 6 Wall. 681, the Court recognized the right of the President, of the Secretary of War, and of the Interior Department to reserve lands, *having competent authority so to do*.

See also

Wood vs. Beach, 156 U. S. 550.

The very extensive powers given to the President by Sections 462-465 of the Revised Statutes in the management of Indian affairs may well be held to include the power to establish a reservation if there were no other Act in relation to the matter.

United States vs. Leathers, 6 Sawy. 17;

Grisar vs. McDowell, 6 Wall. 363;

See 17th Opinions Atty. Gen'l, p. 258.

Speaking of the practice of the President to reserve public lands and set them apart for public use, it is said, in 17th Opinions of the Attorney General at page 258:

"This practice doubtless sprung from the authority given by Congress to the President

early in the history of this government to appropriate lands for purposes more or less general. As under the Act of May 3, 1798, in which the appropriation was made for the purpose of enabling the President to erect fortifications in such place or places as the public safety should in his opinion require. (1 Stats. 554.)”

The Attorney General further says:

“A reservation from the public lands, therefore, for Indian occupation may well be regarded as a measure in the public interest and as for a public use. Congress has in numerous Acts of Legislature recognized it as such. These statutes need not be particularly referred to; they are scattered throughout the statute books; indeed, the annual Indian bill is full of such recognitions.”

17th Opinions Atty. Gen'l, p. 260.

Thus the President has always exercised this power and the power has been recognized by Congress and by the Judiciary, and it may be assumed as settled doctrine that the President of the United States has the authority and power to create reservations of public domain by proclamation.

Reservation Included Public Waters.

By the Constitution of the United States (Art. II, Sec. 3), it is made the duty of the President to take care that the laws be faithfully executed, and in the case *in re Neagle*, 135 U. S. 64, the Court says: “Is this duty limited to the enforcement of the Acts of Congress according to their express

terms, or does it include all the protection implied by the nature of the Government under the Constitution?"

There can be no valid contention that the Act itself, interpreted according to the occasion of its creation and the intent and purpose of Congress in passing it, did not necessarily include the waters immediately adjacent to these islands. And what valid reason can be given for denying the President of the United States the right to reserve any of the public domain, be it land or water, for a public use? The word "lands" may be said to be inclusive of the word "waters." The Act of March 3, 1891, with reference to a reserve on the islands of Kodiak and Afognak, uses this language: ..

"None of the provisions of the last two preceding sections shall be construed as to warrant the sale of any lands * * * which shall be selected by the United States Commissioner of Fisheries on the islands of Kodiak and Afognak for the purpose of establishing fish culture stations."

And yet on December 24, 1893, President Harrison, by his proclamation, set apart Afognak Island, Alaska, as a public reservation including the use for fish culture station, and its adjacent bays and rocks and territorial waters, including among others sea lion rocks and sea otter islands, and containing an express warning to all persons

"not to enter upon or occupy the tract or tracts of land or waters reserved by this proclamation or to fish in or use any of the

waters herein described or mentioned, and that all persons and corporations now occupying said islands or any of said premises, except under said treaty, shall depart therefrom. (27 Stats. 1052.)”

And referring to this proclamation, the Supreme Court of the United States, in the case of *Russian American Company vs. United States*, 199 U. S. 579, says:

“As the President exercised the rights thus reserved and declared the whole island appropriated for the purpose of establishing a fish culture station and warned all persons to depart therefrom, it is clear that the rights, if any, previously acquired by the settlement were terminated by the proclamation.”

Thus a precedent is found for the construction of the executive power to make reservations from the public waters as well as the public lands of the United States, and reserving them to a particular public use, to the exclusion of all other uses and purposes. And this precedent has been in existence nearly a quarter of a century. It has been the construction placed upon the power of the President to make reservations by the officers having charge of the execution of the law for that period of time.

We can see no valid reason for denying the power of the President to reserve any part of the public domain, be it land or water, to an exclusive public use.

Section 254 of the Compiled Laws of Alaska,

which forbids aliens from fishing in Alaskan waters, except with rod, spear or gaff, does not present a serious obstacle to the validity of the President's proclamation.

The proclamation reserves the waters "for the benefit of the Metlakahtlans and such other Alaska natives as have joined them, or may join them in residence on these islands."

No one would contend that there are not many native-born Metlakahtlans after twenty-five years' residence on the islands, or that natives may not join them.

Summarizing the foregoing, we contend that the authorities support these propositions:

(a) That the Act of March 3, 1891, creating the reservation, by necessary intendment and construction included the waters surrounding these islands as a part of the reservation, and that such was the intention of Congress.

(b) That the President had the right, notwithstanding any intent of Congress, to enlarge and extend the boundaries of this reservation.

(c) That the President has the power to create a reserve on his own initiative and to segregate for the public use any of the public domain.

(d) That he has the right to create a reserve embracing portions of the public waters of the

United States for public use including the navigable waters of the United States and to prevent navigation and fishing thereon and therein, and that this reservation of the waters surrounding this reserve for a distance of three thousand feet from the line of mean low tide is valid, and that the appellants were trespassers thereon and that they intruded thereon in defiance of the proclamation of the President.

Appellee Entitled to Equitable Relief.

“The right of the Government to maintain a bill of equity on the ground of obligation or duty either to an individual or to the public when it had no pecuniary interest, is affirmed in several instances by the Supreme Court:

United States vs. S. J. Tin Co., 125 U. S. 273;

United States vs. Beebe, 127 U. S. 338;

United States vs. Marshall, 129 U. S. 579;

United States vs. World's Exposition,
56 Fed. 630;

Cartner vs. United States, 129 U. S. 662.

The Court below in its opinion, adverting to another ground for relief in the bill of appellee (complainant below), to the effect that this structure,

the fish trap of the appellant, was constructed contrary to the provisions of the Rivers and Harbors bill of March 3, 1899, uses this language:

“Plaintiff also bases the right of an injunction on the allegations in the complaint and the proof offered in support thereof, that the defendant’s structures are a hindrance to navigation and are in violation of the provisions of the Rivers and Harbors Act of 1899; so far as this contention is concerned, I am constrained to hold that the defendants—I do not think that the structures are a hindrance to navigation.”

We differ from the learned Judge of the Court below, as to the construction of this statute. The contention of the appellee (complainant below) was that the Rivers and Harbors Act of March 3, 1899, makes it unlawful absolutely for any person to build or commence to build any wharf, pier, weir (fish trap) or other structure in any water of the United States except inside of established harbor lines unless “on plans recommended by the Chief of Engineers and authorized by the Secretary of War.” And the contention of the appellee below was that this structure was constructed in violation of that statute; that the Act made it absolutely unlawful to build any of the prohibited structures in any of the waters over which the United States has jurisdiction, except after complying with the provisions of that Act; and we still so contend.

We respectfully submit that the judgment of the Court below should be sustained.

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Case No. 2828.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA PACIFIC FISHERIES, a Corporation, et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Reply Brief of Appellants

Upon Appeal from the District Court for the Territory of
Alaska, Division No. 1.

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Filed this.....day of October, 1916.
FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

The James H. Barry Co.,
San Francisco
Filed

OCT 23 1916

F. D. Monckton,

Clerk.

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ALASKA PACIFIC FISHERIES, a Corporation, et al.,	<i>Appellants,</i>	}	Case No. 2828
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UNITED STATES OF AMERICA,	<i>Appellee.</i>		

REPLY BRIEF.

Replying to statements in the brief filed in behalf of the appellee, we deem it right to traverse unwarranted assertions and misstatements therein as follows:

There is no group of islands within the Alexander Archipelago which may be properly designated as the *Annette Islands* comprising one main island and surrounding smaller islands. The Government chart may be referred to for the purpose of accurate geographic information. It shows that each of the small islands surrounding Annette Island is distinct and is identified by a name.

The record contains no evidence justifying the statements made on page 2 of appellee's brief with respect to the supervision of the Annette reservation

by the Department of the Interior. It is true, however, as stated, that William Duncan until very recently was the actual and active teacher and leader of the Metlakahtlas.

On page 2 is found the further statement that "Congress has appropriated money from time to time for purposes of improving the condition of these people." There is nothing in the record to show that any of such appropriations were ever made, nor is our attention directed to any act of Congress making the appropriations. We dispute the fact that any moneys have ever been appropriated by the Government for the purposes mentioned prior to the time that Father Duncan was deposed by the Bureau of Education.

The statement on page 3 respecting the alleged arrangement made with P. E. Harris to manage the operation of the cannery on Annette Island, is misleading; there being nothing in the testimony to warrant any assumption that Mr. Harris was appointed to manage a cannery for the Metlakahtlas or the Department of the Interior, or to instruct or train the Metlakahtlas in the science of fish canning.

The Court will find on pages 118 and 119 of the record, the only substantial testimony bearing on this point, as follows:

"Q. Now, you say you received information from the Secretary of the Interior in regard to this proclamation on the 4th of May?

"A. From the Assistant Secretary.

"Q. How did he come to notify you about it?

"A. Because I was corresponding with him.

"Q. How long had you been corresponding with him?

"A. Some time about the middle of March, I think—I am not positive (94) of the dates.

"Q. You were corresponding with him in regard to fishing in these waters, weren't you?

"A. I was corresponding with him in regard to the Harris lease—I had heard of it and I wanted to get a copy of the lease—I wanted to see what was being done.

"Q. You knew about the Harris lease, then, as early as last March?

"A. I knew there was a contemplated lease, but I was advised by our representative at Washington that Secretary Redfield had interfered and that no fishing rights would be given to anybody—that everybody would be treated alike in those waters; that there wouldn't be any special fishing privileges.

"Q. You knew there was a question about the rights to fish in those waters as early as March, did you?

"A. As I told you, I received word that there would be no special fishing privileges given anybody—it was to be left open—that the lease would not carry with it any special fishing privileges."

There is not a particle of testimony in the case to sustain the claim that for twenty-five years, or for any period of time, citizens have been excluded from fishing in the waters contiguous to Annette Island.

Another statement that is misleading is on page 4 to the effect that Mr. Burckhardt had foreknowledge

of the intended arrangement with Harris and that he "was advised that no fishing rights would be granted to anybody in these waters." Mr. Burckhardt's testimony, above quoted, will not bear an interpretation implying notice to him that by refusing to grant fishing privileges there would be ~~no~~ prohibition of fishing. On the contrary, his information on the subject was to the effect that the proposed lease would not carry special fishing privileges and that the fishing ground would be left open.

The affidavit of Harris on pages 54 and 55 of the record to the effect that Heckman had made statements conveying the impression that he had knowledge of the intended proclamation before it had been issued, is altogether too flimsy to support an argument in this case, but in this connection we wish to direct attention to the inaccuracies abounding in the statements which the brief contains; the affidavit of Harris does not state that Heckman said that he had orders to construct a fish trap. What the affidavit does say is that the orders under which Mr. Heckman claimed to be acting were to continue the construction of a trap.

The evidence is conflicting as to whether or not the trap had been put in fishing condition by hanging the webbing thereon previous to the date of the proclamation, but there is nothing to justify a statement in the brief that the trap was completed by capping the same after the date of the proclamation.

It is true that the cannery on Annette Island was

destroyed by fire, but there is nothing in the evidence to warrant any assertion as to the cause of the fire or justify an insinuation that it was of incendiary origin.

The evidence is lacking to give any support to self-praise on the part of any officials for *patient effort* to allay friction between the Government and the majority of the natives on one side and Father Duncan and a few of the older natives on the other side, which the brief states had been in progress for half a dozen years. The evidence, on the contrary, shows that William Duncan (known as Father Duncan) had gone to old Metlakahtla in British Columbia some years prior to the passage of the Congressional Act setting aside Annette Island, to which reference has been made, had taught the natives many useful trades and had, to a large extent, led them into the ways of civilization; that a bishop, who had taken no part in the good work carried on by Father Duncan, came upon the ground and arbitrarily deposed him because of some trivial dispute in relation to the church ceremonies; that this courageous and determined man, rather than submit to this unwarranted conduct on the part of the Bishop, gathered about him the Indians who had become attached to him because of the good he had bestowed upon them, and leaving behind the many splendid buildings he had erected, left old Metlakahtla and emigrated to Annette Island to found a new colony where he could continue his

labors without interference on the part of outside church dignitaries. Here a new village was reared, a new church, new schoolhouse and new homes were erected, and a little later a cannery and saw-mill. According to the statement of Senator Jones on the floor of the Senate in the portion of the Congressional Record hereinafter referred to, the moneys for this purpose were supplied by philanthropic persons, and later on their interests were in turn purchased by Father Duncan himself, who successfully operated the cannery and saw-mill with the assistance of the natives, and this without any aid from the Secretary of the Interior, the Government of the United States or anyone else, and without the aid of a private fishery or any special privileges whatsoever.

On page 3 of appellee's brief, it is stated that about six years ago the Interior Department decided to assume exclusive control of all the material interests of the Indians living on the reservation, leaving only the supervision of spiritual affairs in the charge of said Duncan. This is a fair statement of what happened. The Interior Department took the cannery, the saw-mill and all the other property that had been accumulated and acquired by Father Duncan, and by the Indians under his leadership, and appropriated it and told the old ^{der} ~~Lea~~ that he could content himself henceforth by ministering to the spiritual affairs of the natives. It is stated in the brief of appellee that this resulted in friction. Small wonder that the un-

conquerable spirit of Father Duncan, who had refused to submit to the dictation of an outside bishop, who had abandoned the property he had acquired in old Metlakahtla and emigrated to a new country and there again had built up an industrial community and acquired vast property interest, the result of a life work, should rebel against this arbitrary and unwarranted conduct on the part of the Interior Department. Father Duncan is not an ordinary man but a man of unusual and extraordinary ability, one who would succeed beyond measure in any walk of life, and it was a cruel thing for the Interior Department to shove him aside in his old age and arbitrarily and uncere- moniously take from him the product of his life's toil. To tell him that he might still minister to the spiritual wants of the Indians was merely adding insult to in- jury. That the Interior Department should, because of Father Duncan's advanced age, do what they could to co-operate with him, cannot be doubted, but it is one thing to co-operate with him and another thing to discard him altogether. What the Government did in the last half a dozen years in the way of quieting the friction that existed on Annette Island did not consist in the harmonizing of discordant elements but simply in using the strong arm of the Government to crush Father Duncan and his supporters who were opposed to their regime.

It is next contended in the brief that the act of Congress should be so construed as to include the

surrounding waters, and the same reasons urged by the trial Court in its opinion are again restated. These have been fully discussed in our opening brief, so that further reference thereto will not here be made.

On page 8, however, it is stated: "Furthermore, "the construction placed upon the statute by the officers whose duty it is to execute it, is entitled to "great consideration." That the construction placed upon the statute by the officers whose duty it is to execute it, is entitled to consideration when the statute is called to the attention of the courts, cannot be doubted, but in this case the officers whose duty it was to execute the statute, so construed it that it did not include any of the waters surrounding the island. This is evident from the fact that the President was asked and did make a proclamation so extending the reservation as to include these waters, for obviously, if in the opinion of the officers called upon to construe the act these waters were already included it would be an idle ceremony for the President to make the proclamation referred to.

In the appellant's opening briefs the good faith of the Government in instituting this cause is distinctly challenged, and the false pretenses of the President's proclamation are denounced in a way to call for a response from the appellee, but we find in the brief only a reiteration of vague suggestions of a purpose to assist the Metlakahtlas to self-support and to resume the operation of the cannery, to be effected through

an *arrangement* with one P. E. Harris, to manage the operation of the cannery, to the end that in due course of time the operatives of said cannery would become fully trained in all branches of the fish canning business so that they would be competent to conduct this line of industry themselves.

There is not a particle of evidence as to the abilities of Mr. Harris, and the Court would be unwarranted in assuming that operation of the cannery under his management would prove to be more successful than it had been in years previous when the Metlakahtlas were operating it without any supervision or instructions other than those afforded by Father Duncan.

We wish now to especially emphasize the point that the Government has failed to introduce evidence to inform the Court as to the details of any arrangement made with any person whomsoever to meet any object which the Interior Department may have in view with respect to the fish industry in Alaska. What is claimed in behalf of the Government in this case is not only unsupported by evidence but we reiterate is absolutely untrue.

And now to supply the omission of information which the Government should have introduced in support of the averments of its bill for an injunction, we submit herewith the full details of the Government plan as set forth in a public document bearing directly upon this subject. In doing so we assume that the Court will, from curiosity if not from a more substantial reason, desire to be thus informed.

In the month of June of this year the Senate of the United States had under consideration the annual appropriation bill for sundry civil expenses of the Government, and on pages 11555-6 of the Congressional Record the following appears:

"Mr. NELSON—Mr. President, I offer the amendment I send to the desk, to come in at the end of line 26 on page 122.

"The VICE-PRESIDENT—The amendment will be stated.

"The SECRETARY—On page 122, at the end of line 26, it is proposed to insert:

" 'For the purpose of encouraging industry and self-support among natives of Alaska, and of assisting them in the establishment of small industrial enterprises, \$25,000, or so much thereof as may be necessary, to be immediately available and to remain available until expended, which sum may be used for the erection and repair of buildings, purchase and repair of machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable the natives of Alaska to become self-supporting: Provided, That said sum shall be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States on or before June 30, 1926, and any such sums so reimbursed are hereby reappropriated and made available for expenditure, in the discretion of the Secretary of the Interior, prior to June 30, 1926, for the purposes above indicated. The Secretary of the Interior shall annually submit to Congress on the first Monday in December a detailed report of all moneys received and expended hereunder for the purpose of encouraging industry and self-support among natives of Alaska.'

"Mr. NELSON—Mr. President, this is estimated for in the Book of Estimates, and for that reason, unless objection is made, I am unwilling to take up the time of the Senate in debating it.

"The PRESIDING OFFICER (Mr. Overman in the chair)—Is there any objection to the amendment?

"Mr. MARTIN of Virginia—My attention was diverted, so I shall be obliged if the Senator will briefly state what he proposes to do. There were several Senators talking to me.

"Mr. NELSON—My statement was, Mr. President, that this has been estimated for in the Book of Estimates; and in view of that fact, unless particular objection is made, I am unwilling to take up the time of the Senate in discussing the merits of the amendment.

"Mr. MARTIN of Virginia—I will ask the Senator what is the purpose of the appropriation? I understand it is \$25,000.

"Mr. NELSON—It is for the purpose of relieving what is known as the Father Duncan Colony of Indians on the Annette Islands in Alaska. It is in the Book of Estimates.

"Mr. MARTIN of Virginia—On the judgment of the Senator from Minnesota I will make no objection to it, though, of course, we will have to investigate it when we get it into conference. I am entirely without information on the subject. I make no objection to it. It is estimated for, and I make no objection to it.

"The PRESIDING OFFICER—The question is on agreeing to the amendment.

"The amendment was agreed to.

"Mr. JONES—In connection with the amendment of the Senator from Minnesota, I wish to put some facts into the Record, in order that the conferees may have before them in the consideration of the item.

"The PRESIDING OFFICER—Without objection, it will be so ordered.

"The matter referred to is as follows:

"In August, 1887, William Duncan, an independent missionary, working among the Tsimpsean Indians of British Columbia, brought to the Annette Islands, in the southeastern part of Alaska, a colony of between 800 and 1,000 of these Indians from the old town of Metlakahtla, in British Columbia.

"By act of March 3, 1891 (26 Stat., 1101), Congress set apart Annette Islands for the use and occupancy of these Indians, under such rules and regulations and subject to such restrictions as might be prescribed from time to time by the Secretary of the Interior.

"Under the leadership of Mr. Duncan, this colony made rapid progress. The heads of families of the colony built good homes on lots set apart for them, a large church house was built, a school-house, and other public buildings. A salmon cannery and a sawmill were established, first through the co-operation of Mr. Duncan, the Indians, and philanthropic persons in the United States. Later Mr. Duncan bought the interests of these persons and of the natives and ran the cannery and the sawmill as his personal property and employed native labor.

"In recent years Mr. Duncan, who is now 84 years old, has lost his control over the Indians, and the cannery and sawmill have not been operated within the last four years. Since these industries closed the Indians have no means of making a living on the island and have had to go away for employment. The school had also been closed. Four years ago the Government established in the village of Metlakahtla a school, which it now maintains with five teachers. In order to give the Metlakahtlans an opportunity for self-support on

the island, the Secretary of the Interior decided last winter to put the cannery and the sawmill again in operation. To this end the cannery building was leased for a term of five years, beginning April 1, 1916, to P. E. Harris, a cannery operator of Seattle, Wash., on terms which it was estimated would produce an annual income of \$7,500 for the village and at the same time give employment to a large percentage of the inhabitants.

"On May 17, while necessary repairs on the building were being made by the lessee and while he was awaiting the arrival of new machinery, the cannery building was completely destroyed by fire, as were also the warehouse and a portion of the wharf. Because of this loss by fire the lease is rendered ineffective. The Secretary is unable to require the lessee to fulfill its terms.

"The natives are, therefore, again without any means of support on the island, nor is there any way of providing for such support until the cannery can be replaced and the sawmill repaired. There is also pressing need for the repair of the pipe line which brings water from a mountain lake to the village, and without which there is no adequate supply of water either for drinking or for protection against fire.

"It is therefore urged that the \$25,000 recommended as a reimbursable fund for use in aiding the natives to establish industries (Book of Estimates, 1917, p. 953), but not allowed by the House, be appropriated with the understanding that its first use shall be for the rebuilding of the cannery and the repairing of the sawmill and the pipe line at Metlakahtla and for assisting the natives in the operation of these industries.

"FACTS IN REGARD TO METLAKAHTLA AND THE IMMEDIATE NEED OF A REIMBURSABLE FUND.

"(1) Until the close of the industries four years ago about 800 Indians lived on the island. Every family had a good home. Most of the houses had from four to eight rooms. There were many smaller industries dependent on the cannery and the sawmill.

"(2) After the close of the industries many families moved away, and many of them have taken up permanent homes in places not so desirable as Metlakahtla would be if the industries were re-established. All do leave the island for work in the summer except a few old men and women. When they leave they must carry their children with them. Last summer when fire occurred in the village only two Indians were on the island, and the village would have been destroyed but for the presence of two Government school-teachers and a young Indian who had come over from Ketchikan for the night. The nearest place at which employment can be had is 15 miles away. When the Indians leave the island they must abandon their houses and lose their value, as they cannot be sold.

"(3) After the Government school was established and there was hope for profitable employment on the island the Indians began to return, and there was an increase of approximately 100 in the population within a year.

"(4) The burning of the cannery has almost produced a state of despair among the Indians. The island will be rapidly deserted if the cannery is not rebuilt.

"(5) With the \$25,000 asked for as a reimbursable fund, the cannery can be rebuilt and equipped, the sawmill repaired to produce lumber for the cannery, and the pipe line repaired to bring

water for the use of the village, the cannery, and the sawmill.

"(6) The operation of the cannery and the sawmill will enable the Indians to remain at home during the summer, cultivate their gardens, conduct co-operative stores, and maintain other small industries.

"(7) The operation of the cannery, mill, and other industries will enable the village to repay to the reimbursable fund at least \$5,000 a year, which can be used to assist other native villages in establishing small industries. It will also provide, in addition to this, a small income for much-needed improvements in the village.

"THE HYDABURG COLONY.

"By executive order, June 19, 1912, a tract of approximately 12 square miles on the west coast of Prince of Wales Island, in southeastern Alaska, was reserved for the use of a colony of natives who had migrated thither from the villages of Klinquan and Howkan and founded a settlement, which they named Hydaburg. Under the supervision of the teacher of the United States public school, the Hydaburg Trading Co. was organized to transact the mercantile business of the settlement and the Hydaburg Lumber Co. to operate a sawmill. The Hydaburg people have turned a dense forest into a thriving little town, with a busy wharf, a sawmill that turns them out good lumber at a cost of \$10 a thousand; neat, single-family homes instead of the communal houses in which they lived in their old villages; a long, boarded street, of which they are proud as the finest in Alaska; and a co-operative store, which the first year made a clear profit of 125 per cent., paying a cash dividend of 50 per cent. and adding 75 per cent. to the capital stock."

By this record it appears that the Secretary of the Interior, and his representatives in Alaska, not only did not enter upon arrangements for building another cannery in place of the one destroyed by fire, as asserted on page 5 of appellee's brief, but were unable to do so for lack of the necessary means. An attempt, however, was made to secure the necessary capital by an appropriation to be made by an act of Congress. The attempt was made by an amendment to the Senate Appropriation bill offered by Senator Nelson, which passed the Senate without debate but in the committee of conference when full information was given in the statements made by Senator Jones, the proposed appropriation was stricken from the bill. We make this assertion after having examined the sundry civil expense bill as it was finally enacted, and have found that it does not contain the item of \$25,000 provided by the Nelson amendment.

By the statement made by Senator Jones, it is made to appear that the scheme of the Interior Department to enter into the fish canning industry on Annette Island is but a beginning of a general plan to make a pretense of assisting the Indians, foreign as well as natives of Alaska, as a means to an end, that is, to bring the entire fish industry of Alaska under bureaucratic control. That is undoubtedly the import of reference to the Hydaburg Colony setting forth the similarity of conditions in the conduct and

achievements of the colony settled on the West Coast of Prince of Wales Island, the inference being that these Hyda Indians having done so well they should be encouraged by assistance in the way of building canneries and leasing them in connection with the granting of exclusive rights of fishing.

On page 10 of the appellee's brief, *Farnham on Waters* and *Gould on Waters* are cited as authorities sustaining a contention that Congress has the right to grant exclusive rights of fisheries.

In the opening brief the limitations on the powers of the Government, in either of its executive or legislative branches, to grant exclusive rights of fisheries in public waters, have been shown and the authorities analyzed.

In view of the fact that the question had been settled by decisions of the Supreme Court and by the decision in the case of *Arnold v. Mundy*, referred to in such terms by the Supreme Court on two occasions as to make it a case of equal authority with the decision rendered by that court itself, we did not further inquire into the decisions of the State courts upon this subject. Since a reference, however, is made to the two text books mentioned, which in general terms seem to support the contention that a private fishery may be granted by the Legislature, we desire to direct the attention of the Court to the authorities cited by the authors themselves in support of this contention and to their effect upon the principle presented in the case at bar.

That the State has the right to regulate the fisheries cannot be doubted. The object of such regulation is to make the public right of fishery more valuable. In connection with the exercise of this right the State government may, in many instances, confer some private advantages upon individuals who, under the supervision of the State, do something to add value to the public right.

Thus, in many of the eastern States it was found that oysters would grow if planted in beds that did not naturally produce them. Accordingly, it became a great advantage to encourage the planting of oysters in such beds and thus adding to the output of the oyster fisheries. Individuals would not be warranted in planting oysters if they were not secure in the right to harvest them. Accordingly, it has been held that in connection with the right to regulate the oyster fisheries the State may allot oyster beds to individuals with the view of enabling such individuals to plant oysters therein and harvest the oysters so planted; and further, it has been found that the waters of many of the streams would produce fish not found therein. Accordingly, special privileges have in the State of Massachusetts especially, and probably in some other States also, been extended to persons planting new varieties of food fish in streams and ponds. These privileges, however, under the Massachusetts law did not extend to tidal waters. The cases relied upon by the authors named

depend, as far as we have been able to consult them, upon statutes of the character mentioned.

The first case cited by Farnham, is

Commonwealth v. Weatherhead, 110 Mass.,
175.

This case refers to a right to fish in a pond by one who had planted a new species of fish in the pond under a statute giving such a one a special right as a reward for improving the value of the right of fishery.

The second case cited is

Rowe v. Smith, 48 Ct., 444.

The decision in this case relates to a statute regulating oyster planting. Under it, the shore is allotted to individuals for purposes of planting oysters and the act gives to such individuals the right to harvest the oysters so planted.

The case of

Commonwealth v. Vincent, 108 Mass., 441,

is the first case cited by Mr. Gould in his work on waters. This case deals with the statute giving those planting new varieties of fish special privileges to limited areas in waters not tidal.

In connection with the review of these Massachusetts cases, it is interesting to note what the Massachusetts courts have held upon the question now presented.

In the case of

Weston v. Sampson, 62 Mass., 351,

it was recited by the Supreme Court of Massachusetts that while under the Colonial Ordinances of Massachusetts an upland owner owned the tide flats, the public, nevertheless, had a right to go upon these tide flats for the purpose of exercising their common right of fishery, in so far as such flats were not actually covered by wharves or other improvements of that character, and that this right of the public included not only the right to catch floating fish but also to dig oysters from the soil itself.

In speaking upon this question, Chief Justice Shaw, who delivered the opinion of the Court, says:

“There is no doubt, that by the common law of England all the subjects of the King have an common and general right of fishing in the sea, and in all bays, coves, branches and arms of the sea, which in general is held to extend to all places where tide ebbs and flows. The general rule is expressed by Lord Hale, *De Jure Maris*, *Hargr. Law Tracts*, 11, that all the people of England have a liberty of fishing in the sea, as of common right, and of this they cannot be lawfully deprived, even by the grant of the King.”

Again it is stated:

“And it has been frequently held, that the king takes this right of soil in trust for the public, so far as the fishing is concerned; and although the king may grant away this right of soil to another,

yet his grantee will take it subject to the same trust; and by such grant, however comprehensive in its terms, the public, that is, the king's subjects, cannot be deprived of their common right."

Chief Justice Shaw further holds that if exclusive rights of fishing exist in an arm of the sea, they must be proved by ancient grant and that they cannot be founded if made within the time of memory, and cannot be sustained if made within the time of memory, and that such rights could not be conferred by the grant under Magna Charta.

It could serve no useful purpose to further review decisions of the State courts upon this question, but since the attention of the Court has been specially directed to these citations contained in the text books, we deem it well to call the Court's attention to the character of the cases relied upon as sustaining this proposition and the reason underlying these cases.

This same proposition was exhaustively and carefully inquired into by the Supreme Court of New Jersey in rendering the decision in

Arnold v. Mundy,

where it was said:

"And I am further of opinion, that, upon the Revolution, all these royal rights became vested in the people of New Jersey, as the sovereign of the country, and are now in their hands; and that they, having themselves, both the legal title and the usufruct, may make such disposition of them,

and such regulation concerning them, as they may think fit; that this power of disposition and regulation must be exercised by them in their sovereign capacity; that the legislature is their rightful representative in this respect, and, therefore, that the legislature, in the exercise of this power, may lawfully erect, ports, harbours, basins, docks, and wharves on the coasts of the sea and in the arms thereof, and in the navigable rivers; that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks and bridges for the improvement of the navigation and the ease of passage; that they may clear and improve fishing places, to increase the product of the fishery; that they may create, enlarge and improve oyster beds, by planting oysters therein in order to procure a more ample supply; that they may do these things, themselves, at the public expense, or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments; but still this power, which may be thus exercised by the sovereignty of the State, is nothing more than what is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently, with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people."

It will not only be noted that the right of granting special privileges, referred to in the section quoted, is by the Court said to be nothing more than what

is called the *jus regium*, the right of regulating, improving, and securing for the common benefit of every individual citizen, but we desire to call the Court's special attention to the fact that in the case of

Illinois Central v. State,

Mr. Justice Field refers to this particular portion of the opinion in *Arnold v. Mundy*, with approval.

In this connection we wish to call the attention of the Court to the authorities cited for the reason that they do give support and prove conclusively what we contend for, namely, that all the power of the Government to control and regulate fishing rights is vested in the legislative department and therefore excludes the idea that the executive branch of the Government may interfere with individuals exercising the common right of fishery in public waters.

All of the Supreme Court decisions cited on pages 10 to 14 of the appellant's brief, have reference to the executive power to withdraw from sale lands within the public domain, and executive action of the bureau in charge of Indian affairs, and they fall far short of any expression by the Court of highest authority sustaining the executive power to interfere with the common right of fisheries in the public waters.

Those cases are all distinguishable from the case in hand by consideration of the fact that the Government of the United States is a land proprietor and

No. 2828

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ALASKA PACIFIC FISHERIES, a Corporation,
Its Officers, Agents, Employees and All Persons
Acting By, Through or Under It or In Privity
With It,

Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

Upon Appeal from the United States District Court
For the District of Alaska, Division No. 1.

HELLENTHAL & HELLENTHAL,
of Juneau, Alaska,

C. H. HANFORD,
of Seattle, Washington,

JAMES M. SHOUP,
of Ketchikan, Alaska,

Solicitors for Appellant.

Filed

APR 13 1917

LOWMAN & HANFORD CO., SEATTLE

F. D. Monckton,
Clerk.

No. 2828

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THE UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

Come now the appellants and respectfully petition
this Court for a rehearing for the reasons following:

In the case of *Weber vs. Harbor Commissioners*,

18 Wallace, page 57, the following language quoted by the Court in their opinion was used:

“In the absence of such legislation or usage, however, the common law rule would govern the rights of the proprietor, at least in those states where the common law obtains. By that law the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is, in England, in the King, and in this country, in the state. Any erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a *purpresture*, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise.”

This is undoubtedly a correct statement of the law as applied to the facts in the case then before the Court but the public right of fishery was not then under consideration. In cases like the present where that right is involved the decision in the case of *Weber vs. Harbor Commissioners* must be read in the light of subsequent decisions by the Supreme Court.

In the case of *Mission Rock vs. United States*, 109 Fed. Rep. 768, this Court had occasion to construe the meaning of the language quoted from the case of *Weber vs. Harbor Commissioners*, and Judge Ross, speaking for the court, says:

“In view of the decision of the Supreme Court in the case of *Illinois Central Ry. Co. vs. Illinois, supra*, the right of the state to dispose of such lands, however, does not seem to be as broad as it was declared to be in the case of *Weber vs. Board.*”

In the case of *Illinois Central Ry. Co. vs. Illinois*, 146 U. S. 387, to which Judge Ross refers, the question before the court was whether a grant of submerged lands made by the State of Illinois to the Illinois Central Railway Company was valid. The court held that this grant could not be sustained because it interfered with the public rights of navigation and fishery. It was held that while the state might grant small areas necessary to serve as foundations for wharves to be constructed in aid of navigation, it could not substantially impair the public right of navigation or the public right of fishery. The opinion was written by Justice Field, who also wrote the opinion in the case of *Weber vs. Harbor Commissioners*, so that what was said in the Illinois Central case must be considered as supplementary to what was said in the case of *Weber vs. Harbor Commissioners*.

With reference to the character of the title by which the state holds the submerged lands and the rights of the whole people therein, Mr. Justice Field says:

“That the state holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the state holds title to soils under the tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the creation of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly consid-

ered and sustained in the adjudged cases as a valid exercise of legislative power—consistently with the trust to the public upon which such lands are held by the state. But that is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used to promote the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied to not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of

absolute ownership and control by the state of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and preservation of the peace.”

The effect of this decision as well as other decisions bearing upon the precise question involved in this case was fully discussed in the brief filed by Messrs. Hellenthal & Hellenthal on behalf of the appellants, on page 26 et seq. and we again call the court's attention to these pages in this connection. It was there pointed out from the authorities that the whole people of Alaska, including all others, as well as the Metlakatlans, have a common right of

fishery in the navigable waters situated within the Territory and that neither Congress nor the President have the right to substantially impair this common right.

Referring now to the case of *Commonwealth vs. Manchester*, cited by the court in their opinion, and relied upon as authority for the decision, we have to say: that while the government, be it state or national, holds the title to the navigable waters and their underlying beds in trust for the benefit of the whole people who have therein the common right of navigation and fishery; the sovereign has the right to regulate the use of these fisheries, not with a view of destroying the fisheries, or of impairing the public right or of excluding one portion of the public in order that the balance may have a monopoly, but with a view of making the fisheries more valuable to the whole people.

The government has what is termed the *jus regium*. The character and extent of the right of the government in connection with the fisheries was dealt with by the Supreme Court of New Jersey in the case of *Arnold vs. Munday*, where it was said:

“And I am further of opinion, that, upon the Revolution, all these royal rights became vested in the people of New Jersey, as the sovereign of the country, and are now in their hands; and that they, having themselves, both the legal title

and the usufruct, may make such disposition of them, and such regulation concerning them, as they may think fit; that this power of disposition and regulation must be exercised by them in their sovereign capacity; that the legislature is their rightful representative in this respect, and, therefore, that the legislature, in the exercise of this power, may lawfully erect ports, harbours, basins, docks and wharves on the coasts of the sea and in the arms thereof, and in the navigable rivers; that they may bank off those waters and reclaim the land upon the shores; that they may build dams, locks and bridges for the improvement of the navigation and the ease of passage; that they may clear and improve fishing places, to increase the product of the fishery; that they may create, enlarge and improve oyster beds, by planting oysters therein in order to procure a more ample supply; that they may do these things, themselves, at the public expense, or they may authorize others to do it by their own labour, and at their own expense, giving them reasonable tolls, rents, profits, or exclusive and temporary enjoyments; but still this power, which may be thus exercised by the sovereignty of the State, is nothing more than what is called the *jus regium*, the right of regulating, improving, and securing the common benefit of every individual citizen. The sovereign power itself, therefore, cannot, consistently, with the principles of the law of

nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by the free people.”

The decision in this case was not only spoken of in the highest terms by Chief Justice Taney in rendering the decision of *Martin vs. Wardell*, but in the case of the *Illinois Central Railway Co. vs. Illinois*, Mr. Justice Field refers approvingly to that portion of the opinion above quoted.

While the government, be it state or national, therefore, has no right to impair the public right of fishery, it has a right to regulate the manner in which this right shall be exercised, and this is all that the State of Massachusettes did when it enacted the statute that was under discussion in the case of *Manchester vs. Commonwealth*. This is clearly evident from the language of the Supreme Court of the United States in rendering the opinion. In the course of the opinion it is stated:

“If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States (upon which we express no opinion), the statute may well be considered as an impartial and reasonable regulation of

this liberty; and the subject is one which a state may well be permitted to regulate within its territory, in the absence of any regulation of the United States.”

It is shown from the opinion, therefore, that the question of whether the people of the United States had a common right of fishery was neither considered nor decided by the court but that it was merely held that this right might be regulated.

It is not contended in the case at bar that Congress has not the power to regulate the manner in which the public right of fishery may be exercised in the waters of Alaska, but it is contended that neither the Congress nor the President has the power to exclude the whole people from the exercise of the right in order that a particular person or a class of persons may have the exclusive right to exercise it.

Referring now to the point made in the opinion that the fish trap is in any event a purpresture, we direct the Court's attention to two things: In the first place, the fish trap is an ordinary and usual appliance used by fishermen in the exercise of their common right of fishery and if it is conceded that the common right of fishery exists, and upon this question there can be no doubt, it must follow that in the exercise of this right a citizen may employ such appliances as may be reasonably necessary to enjoy the right.

In the case of *Lincoln vs. Davis*, 53 Mich. 375, the right of fishermen to drive stakes in the ground and construct a fixed fishing appliance in all respects similar to a fish trap was considered and in the course of the opinion by Judge Campbell, concurred in by Judge Cooley, it was said:

“Outside of the statutory line I think there can be no doubt of the right of any one to fish with such appliances as are appropriate to open-water fishing. It has always been customary on these lakes to treat deep-water fishing and navigation as resting on the same basis, except in narrow waters or near shore, where fixed apparatus might have some relation to riparian occupancy as used in connection with it. Fishing such as was involved in this controversy has no natural connection with the dry land or its approaches. It is carried on altogether by the aid of vessel or boat navigation, and is fairly incidental to that class of business.”

The other point to which we direct the Court's attention in this connection is that Congress has given its express sanction to the construction of fish traps in Alaska waters.

Sections 261 and 262, Chapter 3, of the Compiled Laws of Alaska, are as follows:

“Sec. 261. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap,

fish wheel, or fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than five hundred feet, or within five yards of the mouth of any red salmon stream where the same is less than five hundred feet in width, with the purpose or result of capturing salmon or preventing or impeding their ascent to their spawning grounds, and the Secretary of Commerce and Labor is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed."

"Sec. 262. It shall be unlawful to lay or set any drift net, seine, set net, pound net, trap, or any other fishing appliance for any purpose except for purposes of fish culture, across or above the tide waters of any creek, stream, river, estuary, or lagoon, for a distance greater than one-third the width of such creek, stream, river, estuary, or lagoon, or within one hundred yards outside of the mouth of any red salmon stream where the same is less than five hundred feet in width. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net, or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or construct any trap or any other fixed fishing appliance within six hundred yards lat-

erally or within one hundred yards endwise of any other trap or fixed fishing appliance.”

Since Congress has expressly regulated and sanctioned the use of the fish trap, the fish trap cannot be a purpresture, because it was established pursuant to and under the sanction and regulation of Congress.

In relation to the point that the trap was constructed without obtaining the consent of the Secretary of War under the Rivers and Harbors Act, we respectfully ask the Court to give consideration to the finding of the trial court as follows:

“Said trap is in navigable water of the United States technically speaking, it is not within any portion of the waters of the United States which are, or ever have been, used for the purposes of navigation, and is not in, and is not an obstruction to the navigable capacity of, any of the waters of the United States in the sense used in the Rivers and Harbors Act approved March 3, 1899.” (Record, p. 189.)

The evidence proves that the trap is located on a rocky reef, a place to be avoided by all navigators. (Record, p. 98.)

Section 10, of said Act, only prohibits obstructions to the navigable capacity of the public waters, and any structures in “any port, roadstead, haven,

harbor, canal, navigable river, * * * ” except on plans authorized by the Secretary of War. These particular words plainly indicate the will of Congress as to the scope of the Act with respect to the different localities to which the prohibition applies. The general words following the particulars certainly do not have effect to extend the law to cover all the waters within the national dominion, nor to require all useful structures in water to be on plans approved by the Chief of Engineers and approved by the Secretary of War.

The Act is one to which the rule of *ejus dem generis* is naturally and necessarily applicable and controlling.

Missouri Pacific Ry. Co. v. United States, 211 Fed. Rep. 893—896-7. The decision in this case quotes an excerpt from the opinion of Chief Justice Marshall in *United States vs. Bevans*, 3 Wheat. 336, 4 L. Ed. 404, which bears directly and strongly on this case.

In the report of the case of *United States vs. Midwest Oil Co.*, 236 U. S. 459, mention is made of the fact that prior to 1910 at least 252 reservations for useful, though non-statutory, purposes had been made by the President.

It is true that the President, in the exercise of his power as the business manager and sales agent of the government as a land proprietor, has frequently

made reservations and withdrawn from sale public land. In some instances such acts have been legitimate, in some instances they have been ratified by Congress, in some instances their validity has been affirmed in judicial proceedings, and in some instances the unwarranted exercise of such power has been condemned as unlawful by the Supreme Court. It is enough to cite one instance of the kind and we again refer the Court to the case of *Nelson vs. N. P. Ry. Co.*, 188 U. S. 108. And in some instances the executive branch of the government has on the advice of able Attorney Generals refused to encroach upon the common rights of all the people by the exercise of despotic power. An instance of that kind was when Attorney General Garland rendered an opinion worthy of a lawyer of his prestige denying the power of the President to make a reservation of Annette Island for the Metlakahtlans.

We find a similar instance not heretofore cited to the Court, in 44 Land Office Decisions, p. 441. That is a decision of the Commissioner of the General Land Office, approved by an Assistant Attorney General, holding that the executive branch has no power to make a reservation of shore lands in Alaska for the benefit of Indians.

Any number of executive acts, whether valid, questionable, or invalid, do not establish the rightfulness of an executive proclamation which usurps

power not vested in the President by the Constitution or any law.

THERE IS NO EQUITY IN THE BILL.

Apparently, the facts of paramount importance have not been considered, and ^{the lack of} the prime essential in a bill for an injunction has been overlooked.

Four thousand dollars was expended in constructing this trap, after an assurance that the Secretary of the Interior would not attempt to create monopolistic rights in the fisheries surrounding Annette Island and before the issuance of the proclamation. (Record, pp. 118-119.)

The trap was constructed with due observance of the regulations prescribed by Act of Congress and it does not encroach upon any public or private right; and it is a recognized legitimate means of carrying on the fishing business in Alaska.

The proclamation declares that the reservation is a necessary adjunct of a cannery which the Secretary of the Interior proposed to establish on the Island; there is no cannery on the Island; Congress refused to make an appropriation providing the necessary funds for building a cannery; the scheme of carrying on the fish canning business for the benefit of Metlakahtlans under a lease has been abandoned by the lessee and the whole flimsy case, made

CERTIFICATE.

I, Cornelius H. Hanford, an attorney at law admitted to practise in the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify that I am of counsel for the appellant in the above entitled cause; that in my judgment the foregoing petition for a rehearing of said cause is well founded and that it is not interposed for delay.

Cornelius H. Hanford

Of Counsel for Plaintiff in
Error.

out of affidavits mostly by the attorneys representing the government, has collapsed.

In lieu of equitable grounds for an injunction, we are told in the concluding paragraph of the Court's opinion that the appellant has no right vested or otherwise to construct or maintain a fish trap within the waters reserved by the President's proclamation.

It is a bitter pill that a citizen must take, when arrogant officials order him to vacate ground where by the laws of his country all have common and equal rights, in order that a band of aliens may monopolize Nature's bounty. We regret that representatives of the government prosecuting the case have not been impressed with a sense of injustice in pursuing a course destructive of invested capital and discouraging to enterprise in the conservation of food at a time when a hungry world is crying for it.

As though might were right, the government, in a Court of Chancery, stands like a monarch asserting its power, as the all-sufficient reason for committing robbery in order to bestow a gratuity.

Respectfully submitted,

HELLENTHAL & HELLENTHAL,
C. H. HANFORD,

Solicitors for Appellant.

7
No. 2834

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

PRUDENTIAL INSURANCE COMPANY OF
AMERICA, a Corporation,

Plaintiff in Error.

VS.

ADA T. STEWART,

Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF
WASHINGTON, SOUTHERN
DIVISION.

TRANSCRIPT OF RECORD

Filed

AUG 23 1916

F. D. Monckton,

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HON. EDWARD E. CUSHMAN, *District Judge.*

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Fidelity Bldg., Tacoma, Wash.

INDEX.

	Page
Amended Answer	7
Application for Insurance	33
Assignments of Error	50
Bill of Exceptions	19
Company's Motion for Instructed Verdict at Conclusion of Plaintiff's Case.....	20
Company's Motion for an Instructed Verdict at Conclusion of all the Evidence.....	28
Complaint	1
Citation for Writ of Error and Proof of Service.....	49
Clerk's Certificate of Transcript.....	64
Decision, Court's	29
Demurrer	6
Defendant's Exhibit A (Application for Insurance)	33
Empaneling of Jury	14
Judgment	44
Motion for Judgment on the Pleadings.....	19
Motion to Strike from Reply.....	12
Order Overruling Demurrer.....	6
Order Sustaining Motion to Strike from Reply.....	13
Order Denying Petition for a New Trial.....	17
Order Extending Time to Serve and File Bill of Exceptions	18
Order Allowing Writ of Error.....	47
Order Enlarging Time to File.....	63
Petition for a New Trial.....	15

Index	Page
Plaintiff's Motion for an Instructed Verdict_____	28
Policy of Insurance _____	37
Petition for Writ of Error_____	46
Plaintiff's Exhibit A (Policy of Insurance)_____	37
Reply _____	11
Stipulation Extending Time in Which to Serve and File Bill of Exceptions_____	17
Stipulation for Settlement of Bill of Exceptions__	18
Supersedeas and Cost Bond_____	55
Stipulation as to Contents of the Transcript of Record _____	57
Stipulation as to Parts of Policy and Application to be Printed _____	60
Stipulation as to Contents of Printed Record____	61
Stipulation and Order Adding to Record_____	59
Verdict _____	14
Writ of Error_____	47
WITNESSES—	
Plaintiff's:	
Ada T. Stewart_____	20
Harriet Baker _____	20
Defendant's:	
Alfred Yantes _____	21
John D. Dole_____	21
J. Valentine _____	25
Rebuttal:	
Ada T. Stewart_____	26

*In the District Court of the United States, for the
Western District of Washington,
Southern Division.*

ADA T. STEWART,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA, a corporation,

Defendant.

No. 1915

COMPLAINT.

Comes now the above named plaintiff, wife of the late Ernest C. Stewart, and complaining of the above named defendant, the Prudential Insurance Company of America, for a cause of action alleges:

I.

That the said defendant is a corporation, duly organized, acting and existing under and by virtue of the laws of the State of New Jersey, with its principal place of business at Newark, New Jersey, for the purpose of carrying on a life insurance business.

II.

That during all the times herein mentioned, the plaintiff was and now is a resident, citizen and inhabitant of Pierce County, situated in the Western District of Washington, Southern Division.

III.

That on the 2nd day of February, 1915, the deceased Ernest C. Stewart signed a written application to the defendant company on the printed

form prepared and furnished by the company, for a policy of insurance in the sum of \$5000.00, which, by the terms of the application, was to become a part of any contract of insurance issued thereon, a copy of which application is hereto annexed, marked Exhibit "A" and by reference, made a part of this complaint.

IV.

That one of the questions propounded to the deceased by the defendant company in said application was:

"Is premium to be paid annually, semi-annually or quarterly," to which the deceased replied: "Quarterly." That another question propounded to the applicant on said printed form was:

"What amount have you paid in advance on account," to which the applicant answered: "C. O. D.", (meaning cash on delivery.)

V.

That said application prepared by the defendant company contained the following agreement:

"And it is further agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in full, while my health, habits and occupation are the same as described in this application."

VI.

That thereafter, and in pursuance and acceptance by the defendant company of said application, it issued its policy of life insurance, a copy

of which is annexed hereto, marked Exhibit "B" and by such reference, made a part of this complaint.

VII.

That among the provisions therein contained, was the following:

"PREMIUM—Twelve and 70/100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company,"

following this with an alternative provision of paying quarterly on certain dates mentioned, to local agents in Tacoma, providing such agents had official receipts signed by the president or secretary, and countersigned by an authorized agent of the company.

VIII.

That on the 15th day of April, 1915, said policy of insurance was delivered to the said deceased, and the first premium paid thereon.

IX.

That it was further provided by one of the terms and conditions of the policy as follows:

"GRACE IN PAYMENT OF PREMIUM.—In the payment of any premium under this policy, except the first, a grace of one month, not less than thirty days, without interest, will be allowed during which time the policy will remain in force."

X.

That on the 19th day of July, 1915, said Ernest C. Stewart died by accidental drowning and thereafter, and on or about August 23, 1915, the de-

fendant was duly notified of the death of the said Ernest C. Stewart and on or about October 23, 1915, due and sufficient proofs of the death were submitted to the defendant.

XI.

That on or about October 29, 1915, the defendant denied liability in a letter addressed to Mr. H. H. Johnson, agent for plaintiff, in words and figures as follows:

"In Re 1919116—Ernest C. Stewart, Oct. 29, 1915.

Mr. H. H. Johnson,
c-o Tacoma Daily Index,
Bankers Trust Building,
Tacoma, Wash.

Dear Sir:—

We enclose herewith draft for \$12.70 which accompanied your October 23rd letter and would advise that we cannot accept the payment as the policy according to its terms, became null and void on June 19th, 1915.

Very truly yours,
C. P. KENDALL,
Manager."

XII.

That on the 28th day of October, 1915, Robert Gemmell, assistant secretary of the company, wrote H. H. Johnson, agent for plaintiff, a letter in part as follows:

"You will recall that the first premium was paid on April 15, when the policy was delivered to Mr. Stewart in our Tacoma office by Mr. Dole, the

Superintendent in charge. One month before the due-date of the second premium a notice of the premium due May 19th was sent to Mr. Stewart from this office, and ten days before the end of the grace period (which expired June 19, 1915), Mr. Dole sent a notice to the insured called special attention to the approaching end of this grace period."

XIII.

Plaintiff alleges that the due-date of the second premium was due by the terms of the policy on the 15th day of July, 1915, or one-quarter of a year after the policy was delivered, and the first premium paid, and that one month's grace was allowed, within which to pay, before the policy would become forfeited, and that the said Ernest C. Stewart died within said period.

XIV.

That said Ernest C. Stewart, during his lifetime, and the above named plaintiff, have duly complied with all the conditions of said contract by either of them necessary to be complied with.

XV.

That plaintiff is now the owner and holder of said contract, and there is now due her from the said defendant, the full sum of \$4961.90, together with interest thereon from the 29th day of October, 1915; that said defendant has wholly neglected to pay said policy or any part thereof.

WHEREFORE plaintiff demands judgment against the defendant for the sum of \$4961.90, together with interest thereon from the 29th day of

October, 1915, besides her costs and disbursements of this action.

S. WARBURTON and
BROCKWAY & BOYLE,
Attorneys for Plaintiff.

(Filed Nov. 10, 1915)

(Duly Verified.)

(To the complaint is annexed copies of the Policy of Insurance, application for Insurance, and Medical Examination. By stipulation, the medical examination is entirely omitted. The entire policy of insurance, and the portions of the application, designated in said stipulation, are printed at pages 33 to 45 of this record.)

(Omitting Title.)

Now comes the defendant and demurs to the complaint filed in the above entitled cause, and for cause of demurrer alleges:—

That said complaint does not state facts sufficient to constitute a cause of action.

Dated December 7th, 1915.

(Filed Dec. 9, 1915.)

S. A. KEENAN,
Attorney for Defendant.

ORDER.

(Omitting Title.)

The above cause coming on for hearing and argument on the demurrer of the defendant to the plaintiff's complaint, the court having heard the argument,

IT IS HEREBY ORDERED that said demurrer be and the same is hereby overruled, and the defendant is given ten days from the 13th day of

December, 1915, in which to answer plaintiff's complaint.

An exception by the defendant to the court's ruling, is noted.

Dated this 17th day of December, 1915.

EDWARD E. CUSHMAN,

(Filed Dec. 17, 1915.)

Judge.

AMENDED ANSWER.

(Omitting Title.)

Now comes the defendant and for an amended answer to the complaint of the plaintiff filed herein, admits, denies and alleges:—

I.

Defendant admits the averments contained in paragraph 1 hereof.

II.

Answering paragraph 2 thereof, this defendant has no knowledge or information sufficient to form a belief, and therefore denies the same.

III.

Answering paragraph 3 thereof, defendant admits the same, and believes that Exhibit A is a full, true and correct copy of said application.

IV.

Answering paragraph 4 thereof, the defendant admits the correctness of the quotations but denies the interpretation placed thereon by the plaintiff.

V.

Answering paragraph 5 thereof, defendant admits the same.

VI.

Answering paragraph 6 thereof, the defendant admits the same and believes that Exhibit B is a true and correct copy of said policy of insurance.

VII.

Answering paragraph 7 thereof, defendant admits the correctness of the quotation contained therein but denies each and every part of the remainder of said paragraph.

VIII.

Defendant admits that on or about April 15th, 1915, said policy of insurance was taken up by said insured.

IX.

Defendant admits the correctness of the quotation contained in said paragraph.

X.

Answering paragraph 10 of said complaint, defendant has no information or knowledge sufficient to form a belief and therefore denies the same.

XI.

Answering paragraph 11 thereof, defendant admits the same.

XII.

Answering paragraph 12 of said complaint, defendant admits the correctness of the quotation therein contained.

XIII.

Answering paragraph 13 of said complaint, defendant denies the same and the whole thereof.

XIV.

Answering paragraph 14 of said complaint, the defendant denies the same and the whole thereof.

XV.

Answering paragraph 15 of said complaint, defendant denies the same and the whole thereof.

For further answer and defense to said complaint the defendant alleges:— —

1. That on February 2nd, 1915, Ernest C. Stewart at Tacoma, Washington, signed an application to defendant for a life insurance policy on his life, a copy of which policy is annexed to plaintiff's complaint. That at the same time and place, he also signed a medical examination as part of his application, which application, as so executed, was at once mailed to defendant's home office at Newark, New Jersey.

2. That immediately on its arrival, at the home office, said application was submitted to the medical department of defendant, and to the other officials whose duty it was to pass thereon, and in due course said application was approved and accepted by the defendant, and on February 19th, 1915, it duly executed and issued, thereon, its policy of insurance Number 1919116 on the life of said Ernest C. Stewart.

3. That so soon as the said policy was executed and issued, it was mailed to defendant's agent at Tacoma to be delivered at once to said assured. Said policy was received by defendant's agent on or about February 24th, 1915, and was immediately tendered to said assured who thereupon said he was not able to pay the first premium, and requested defendant's agent to hold it for a short time, and he would pay the premium. That as requested, defendant's agent kept said policy for the assured ready, at all times, to deliver it to him upon the

payment of said first premium. That on or about April 15th, 1915, said assured paid said premium and the policy was then delivered to him. That defendant was, in no way, to blame for the delay in the delivery of said policy, but that said assured was entirely responsible therefor.

4. That said policy of insurance was written and executed in accordance with the conditions of said application and the agreement of the assured and defendant; that said assured, at the time the policy was tendered to him and also at the time he paid the first premium and received the policy, knew the second quarterly premium, by the terms of the policy, would become due May 19th, 1915, and the subsequent quarterly payments on the 19th of August, November, February and May of each recurring year during the life of the policy. That with full knowledge thereof, he received and accepted said policy and kept it in his possession. By reason thereof, this plaintiff is now estopped from denying that the premiums were due and payable as aforesaid.

5. That by reason of the non-payment of the second quarterly premium due on May 19th, 1915, said policy lapsed and became void on June 19th, 1915.

Wherefore, defendant demands judgment for the dismissal of this case and for its costs.

Dated January 4, 1916.

S. A. KEENAN,

Attorney for Defendant.

(Filed Feb. 1, 1916)

(Duly verified.)

REPLY.

(Omitting Title.)

Comes now the plaintiff, and in reply to the further and separate defense of the defendant, and says:

I.

In reply to paragraph III. of said defense, plaintiff admits that on or about the 15th day of April, 1915, the insured Ernest C. Stewart paid the first premium, and the policy was then and there delivered to him by the defendant's agent, but denies that she has any knowledge or information sufficient to form a belief, as to each and every other allegation contained in said paragraph, and therefore denies the same.

II.

In reply to paragraph IV. plaintiff admits that the policy of insurance was written and executed in accordance with the conditions of the application and agreement, between the insured and the defendant, but plaintiff denies each and every other allegation in said paragraph contained.

III.

In reply to paragraph V. of said defense, plaintiff denies each and every allegation therein contained.

In further reply to the allegations contained in said separate affirmative defense, plaintiff alleges:

That prior to the signing of the application of said insurance by Ernest C. Stewart, the defendant's agent exhibited to him a copy of the policy that the company would issue, provided, he signed the application and paid the premium; that said

printed form of policy which was prepared by the company for such purpose, contained the provision which was afterwards incorporated in the policy actually issued on the life of said Stewart, to-wit:

“PREMIUM—_____Dollars payable on the delivery of this policy and thereafter quarterly annually at the home office of the company.”

That it was understood and agreed between the said Stewart and the agent of the insurance company, that the policy according to its terms, would not go into force and effect until the same should be delivered and the premium paid and that the next quarterly premium would be payable one-quarter of a year after the date of the payment of the first premium and the delivery of the policy, and that said insured understood, that at the time of the delivery of the policy, and in accordance with its terms, that the second quarterly premium would be payable one-quarter of a year after the 15th day of April, 1915.

WHEREFORE plaintiff prays for judgment as in her complaint set forth.

S. Warburton and
Brockway & Boyle,
Attorneys for Plaintiff.

(Filed January 29, 1916.)

(Duly verified.)

MOTION TO STRIKE.

(Omitting Title.)

Now comes the defendant and moves the court:

I.

That the portion of said reply beginning with the word “That” in Line 5, page 2, and ending with

the word "Company" in Line 15 of said page, be stricken for the reason that the same is wholly immaterial and inadmissible in the pleadings for any purpose whatever.

II.

That the portion of said reply beginning with the word "That" in Line 16, page 2, and ending with the figures "1915," line 26 of said page, be likewise stricken for the reason that it is incompetent, immaterial and inadmissible in the pleadings for any purpose whatever.

Notwithstanding the foregoing motions, but insisting thereon, and in the event the court should overrule said motions or either of them, the plaintiff further moves:

1. That plaintiff be required to set out the name and address of the agent which she claims exhibited a copy of the policy to the assured.

2. That plaintiff be required to set out and make more definite and certain by stating the name and address of the agent of the company who stated to assured that the policy would not go into force and effect until the same should be delivered and the premium paid.

Dated February 1, 1916.

S. A. KEENAN,
Attorney for Defendant.

(Filed Feb. 1, 1916.)

(Omitting Title.)

The above entitled case coming on for consideration May 29th, 1916, on the motion of defendant to strike certain portions of plaintiff's reply, and

the Court having considered the same and the argument of counsel for the respective parties:

IT IS ORDERED that said motion be and the same is hereby sustained.

EDWARD E. CUSHMAN,

(Filed 1916.)

Judge.

EMPANELMENT OF JURY.

On May 31st, 1916, all things being regular, plaintiff appearing in person and by her counsel S. Warburton and Boyle, Brockway & Boyle; and defendant appearing by its counsel, S. A. Keenan, a jury was regularly called, selected, sworn and empaneled to try the cause.

VERDICT.

(Omitting Title.)

We, the jury empaneled in the above entitled cause, find for the plaintiff, Ada T. Stewart, and against the defendant, The Prudential Insurance Company of America, in the sum of Five Thousand One Hundred Thirty Five and 50/100 Dollars, being instructed by the Court so to do.

FRANK B. COLE,

(Filed May 31, 1916)

Foreman.

JUDGMENT.

(Omitting Title.)

The above entitled matter having come regularly on for trial on May 31, 1916, the plaintiff being present and represented by her counsel, S. Warburton, and Boyle, Brockway & Boyle, and the defendant being represented by its counsel, S. A. Keenan, and a jury having been empanelled, and plaintiff having introduced her evidence and rested, and

the defendant having introduced its evidence and rested, and plaintiff having introduced her evidence in rebuttal and rested, and the court having instructed the jury, at the request of plaintiff, to return a verdict in favor of plaintiff, the jury having considered of its verdict, and having returned a verdict in favor of the plaintiff in the sum of \$5135.50, the court being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the plaintiff, Ada T. Stewart have and recover from the defendant the Prudential Insurance Company of America, the full sum of \$5,135.50, together with interest thereon at the rate of six per cent per annum from said 31st day of May, 1916, together with her costs and disbursements herein, to be taxed by the clerk of the court, and that judgment be and the same is hereby entered in her favor and against the said defendant in said sum, said judgment to have effect and be entered as of May 31, 1916.

EDWARD E. CUSHMAN,
Judge.

Dated this 26th day of June, 1916.
(Filed June 26, 1916.)

PETITION FOR A NEW TRIAL.

(Omitting Title.)

Now comes the defendant and respectfully petitions the Honorable Court for an order setting aside the verdict returned in this case and granting the defendant a new trial of said cause, for the reason and upon the grounds as follows, to wit:—

I.

Insufficiency of the evidence to justify the verdict and judgment:—

(a) It appears from the application and policy of insurance that the insurance policy lapsed and ceased to be a contract for any purpose prior to insured's death.

(b) The testimony received on the trial conclusively shows that the insured placed that construction on the policy.

(c) The plaintiff has entirely failed to offer any evidence or testimony establishing the existence of any contract of insurance between the insured and the company at the time of the former's death.

II.

Error in law occurring at the trial:—

(a) The Court erred in over-ruling defendant's demurrer to the plaintiff's complaint.

(b) The Court erred in denying plaintiff's objections to the introduction of any testimony, on the part of the plaintiff, at the opening of the trial, for the reason that her complaint did not state a cause of action against the defendant.

(c) The Court erred in denying defendant's motion, after the opening statement of counsel for plaintiff, for judgment on the pleadings.

(d) The Court erred in denying defendant's motion for a directed verdict in favor of defendant at the close of plaintiff's case.

(e) The Court erred in denying defendant's motion for a directed verdict in its favor at the close of all the testimony.

(f) The Court erred in granting plaintiff's motion for a directed verdict at the close of all the testimony.

(g) The Court erred in directing and instructing the jury that the insurance policy was in full force and effect at the time of the insured's death.

(h) The Court erred in accepting and recording the verdict of the jury.

To all of which defendant's counsel duly excepted, and the exception was allowed by the Court.

WHEREFORE, defendant prays the Court that said verdict, and judgment if entered thereon, be set aside, and a new trial be granted herein.

Dated at Seattle, Washington, June 12th, 1916.

S. A. KEENAN,
Attorney for Defendant.

(Filed June 14, 1916.)

(Duly verified.)

ORDER.

(Omitting Title.)

The above entitled matter having come regularly on for hearing on the defendant's motion for a new trial, the court being duly advised in the premises,

IT IS HEREBY ORDERED, that said motion be and the same is hereby denied, and an exception allowed the defendant.

Dated this 19th day of June, 1916.

EDWARD E. CUSHMAN,
(Filed June 19, 1916.) Judge.

STIPULATION.

(Omitting Title.)

It is hereby stipulated and agreed by and between parties to the above entitled cause that defendant's time in which to prepare and serve a pro-

posed bill of exceptions in the above entitled cause may be extended to June 30th, 1916.

Dated June 1st, 1916.

S. WARBURTON,
BOYLE, BROCKWAY & BOYLE,
Attorneys for Plaintiff.

S. A. KEENAN,
Attorney for Defendant.

On considering the foregoing stipulation, and it appearing a proper cause for such an order:

IT IS HEREBY ORDERED that defendant's time in which to prepare and serve its proposed bill of exceptions in the above entitled cause be and the same is hereby extended to June 30th, 1916.

Dated June 5, 1916.

EDWARD E. CUSHMAN,
(Filed June 5, 1916.) Judge.

STIPULATION.

(Omitting Title.)

Whereas defendant's Proposed Bill of Exceptions has been heretofore duly served and filed, and plaintiff, Ada T. Stewart, having no amendments to propose thereto:

IT IS HEREBY STIPULATED AND AGREED by and between the parties to this action through their respective counsel, that the Hon. Edward E. Cushman, the Judge who tried said action, may settle and sign the Proposed Bill of Exceptions, filed by defendant herein, as Bill of Exceptions in this case, and that the same may be signed by said

Judge at Seattle, Washington, in said district where said cause was tried.

Dated June 27th, 1916.

S. WARBURTON,
BOYLE, BROCKWAY & BOYLE,
Attorneys for Plaintiff.

S. A. KEENAN,
Attorney for Defendant.

(Filed June 29, 1916.)

BILL OF EXCEPTIONS.

(Omitting Title.)

BE IT REMEMBERED that in the trial of the above entitled cause, on the 31st day of May, A. D. 1916, the Hon. Edward E. Cushman presiding, both parties appearing by their respective counsel. A jury was duly and regularly impaneled and the following proceedings had:—

1. Defendant's counsel moved the Court for judgment on the pleadings on the ground and for the reason that no cause of action was stated in the complaint. The Court over-ruled the motion; defendant excepted to the ruling of the Court, which exception was allowed.

2. Defendant's counsel objected to the introduction of any testimony whatever on the part of the plaintiff on the ground and for the reason that no cause of action was stated against the defendant. The Court over-ruled the objection; defendant excepted to the ruling of the Court, which exception was allowed.

3. Plaintiff was called to the stand as a witness in her own behalf, and testified as follows:

My name is Ada Stewart. I was born in the State of Washington. Ernest Stewart mentioned in the complaint was my husband. We were married in Tacoma two years ago last November. After that, we lived at Sprague, Washington. We came to Tacoma, my home. I was born at Union City. My husband died July 19th, 1915. I have two children.

Thereupon, Harriet Baker was called as a witness on behalf of the plaintiff, and being duly sworn, testified as follows:

I was acquainted with Mr. Stewart, the husband of Mrs. Stewart, during his lifetime. Last July was the last time I saw Mr. Stewart, July 19th. I saw his body after his death, July 21st.

4. The policy of insurance described in the complaint was offered and received in evidence, and is hereto annexed, marked Exhibit A and made a part of the Bill of Exceptions.

PLAINTIFF RESTS.

Thereupon, defendant's counsel moved "The Court that the jury be directed to return a verdict in favor of the defendant in this case, for the reason that the complaint does not state facts sufficient to constitute a cause of action and that the evidence does not show any liability on the part of the defendant in this case." The Court over-ruled the motion; defendant excepted to the ruling of the Court, which exception was allowed.

Thereupon, the defendant called as a witness in its behalf Alfred Yantis who, being duly sworn, testified as follows—:

My name is Alfred Yantis, life insurance busi-

ness. Have been engaged in that business seven years this October, with this company at that time and was so engaged with this company last January and February. I recollect about the insurance policy just received in evidence in this case. The policy is dated February 19th. It came into my hands about the 26th of February.

“THE COURT: Do you admit that it was delivered on the 15th of April?”

“MR. KEENAN: Yes; that it was delivered on the 15th of April.”

“MR. WARBURTON: And the premium paid on that date.”

“MR. KEENAN: Yes.”

On the 26th of February I went to Mr. Stewart's home in the evening and explained the policy to him.

“MR. KEENAN: Tell what was said and done between you and Mr. Stewart on the 26th of February, when you say you delivered it to him?”

“MR. WARBURTON: We object to that.”

“THE COURT: Upon what theory do you offer this testimony?”

“MR. KEENAN: The theory is of course, that as soon as the policy was received by us, we presented it to Mr. Stewart, and we want to show by this witness' testimony the reason Mr. Stewart did not accept the policy until some time after, because he did not have the money, and that he requested the agent to hold it until he got the money, and that he did not get the money until the 15th of April to pay for it.”

The objection was over-ruled and the witness proceeded as follows:

I explained the policy to Mr. Stewart, and he stated at that time that it was not convenient to pay the premium, and he stated he would come to the office. I went over the contract, stating that the premiums fell due in February, May, August and November, and that it was necessary for him to pay the premium before the policy was in force. He stated that he expected some money or that there was some money due him or something of that kind, and that he would be in the office. The reason I did not deliver him the policy, it was necessary for him to pay for the contract before I delivered it. When he requested me to hold the policy, I told him it was not in force until he paid for it. I afterwards called at Mr. Stewart's home to deliver the policy and get the premium. That was about May.

5. It was the date that he paid the premium. I went to the house in the morning with the policy, and Mrs. Stewart stated that he had left the house with the money, intending some time during the day to drop into the office. I had no conversation with Mr. Stewart at that time.

CROSS EXAMINATION.

I impressed upon his mind that the policy would not take effect or be in force until he paid the premium.

John D. Dole, being first duly sworn, testified as follows on behalf of the defendant:

My name is John D. Dole. Am Superintendent of the Prudential Insurance Company in Ta-

coma. The insurance policy offered in evidence went through my office. After receiving applications for insurance policies such as this, the custom of my office in relation to the General Home Office at Newark, New Jersey, is to turn over to the local physician the application, and immediately upon making the examination the physician mails it direct to the Home office. It usually takes from ten to fifteen days to receive the policy from the Home Office after the receipt of the application of the local physician. This application and policy went through the same routine. We have no record in the office of just when the policy was received here. Immediately on receipt of the policy it was given to the man who wrote the application, Assistant Superintendent Yantis, the gentleman who just testified. It was his duty to immediately take the policy to the applicant for delivery.

I remember when Mr. Stewart called at the office and paid his premium. It was paid to me personally. I delivered the policy to Mr. Stewart. Mr. Stewart called at my office and introduced himself, stating that my representative had called at his home with the policy, and that owing to financial circumstances, he was unable to pay until that time. I questioned him very closely about the cause, and he informed me that it was owing to his financial circumstances that he could not pay for the policy before. I went into the details of the policy with him. I opened up the policy. I had him sign his name. I was not acquainted with him, and I told him to affix his signature on a piece of paper and compared it with the application to be sure he was the man who signed the application. I read the policy over, that is, the

dates it was due and the beneficiary and in fact everything applying to the face of the policy and the due dates. I also asked Mr. Stewart if he was aware of the fact that his paying that day made no difference in the next payment and he said that he thoroughly understood that. I told him that his next payment would be due and asked him if he did not think it advisable to pay both at that time, being so close to the next payment. I also told him that if he did not wish to pay at that time that he would have a little over sixty days to pay the next premium, and he said that that was perfectly satisfactory. To my recollection, at that time he was familiar with the policy and the dates it was due throughout the entire year. I say I called his attention to the due date of the next premium, in May, and the first premium was in April. I called his attention to the fact that the next premium was due the following month. I stated to him that he could pay both at that time if he wanted to.

CROSS EXAMINATION.

Mr. Yantis immediately came back to the office and left it (the policy) in my possession. Mr. Stewart came in after he left. I explained to him that the policy did not come into force and effect until it was delivered and the premium actually paid. I did not read to him "Premium \$12.70, payable on the delivery of this policy, that was the due date on the 15th, and thereafter quarter annually." I did not think that meant anything. I could not say that a copy of this policy was shown to him when the application was made. I did not write it. That is not a custom of my

company. It is not a custom of insurance agents, not unless a man demands it. We do not want to hide it. We have nothing to hide. I mean to say that it is not the custom of a soliciting agent to show a man who is going to take out a \$5,000.00 or a \$10,000.00 policy to show him the policy he will get, unless he asks for it. I have known of a man taking out insurance and not ask for it. If it should appear from the testimony that Mr. Stewart as a matter of fact understood that his next quarter annual premium was not payable until the 15th of July, I would not testify that I convinced him it was due on the 15th of May, I could not convince him of that. I would not necessarily come to the conclusion that he so understood it.

REDIRECT EXAMINATION.

I do recall about this notice of second premium being sent from my office through my orders about five days before the second premium was due.

Miss J. Valentine, being first duly sworn, testified as follows on behalf of the plaintiff:—

I remember the Stewart policy. We have no record of just what date the policies come in but it is usually five days after leaving the Home Office, five days in the mail. I have a recollection of sending a notice out about two weeks. I sent a notice by an agent out to see if these people wanted to pay the premium. If they still wanted to keep their insurance, as I always do, and the agent reported that these people were out on a vacation and that he could not locate them, and Mr. Dole was standing there, and he immediately called my attention to the fact that I should send

out a written notice by mail, which I immediately did. I think the due date is May 19th and then there is thirty days' grace, and I sent it out five days prior to June 19th. I have a distinct recollection of having sent this notice out.

CROSS EXAMINATION.

Yes, sir, we keep a record of those notices, the premium receipt shows record. I have no record at all to show when I sent this notice out. I know I sent it out. Yes, sir, I have a distinct recollection of having sent out this particular notice. I am sure of that, yes, sir. I can not recall every notice that I sent out on every policy from my office, no, sir. I remember this so well particularly because the agent came in and said they were on a vacation. I can not state when that was, but from my recollection about five days before the expiration of the thirty days' grace period. That would be about five days before the 19th of June. Then the agent would go up there about the 14th. Mr. Mottoe was the agent. He said they had gone on a vacation. He reported that they had gone a vacation. I do not know whether that was true or not.

Thereupon, defendant offered in evidence the original application, upon which the policy in question was issued. Hereto annexed, marked Exhibit B and made a part hereof.

DEFENDANT RESTS.

In rebuttal, plaintiff, Ada Stewart, was recalled to the witness stand.

Q. Will you state what your husband said on the morning of his death, if anything, in ref-

erence to the payment of the premium on this policy?

MR. KEENAN: I object to that as wholly incompetent, irrelevant and immaterial and inadmissible under the pleadings in this case.

Objection sustained.

MR. WARBURTON: The testimony is in here, that he understood that the policy, that the premium was payable on the 15th of June. I want to show by this witness that he never understood anything of the kind; that as a matter of fact, he understood that he had until the 15th day of July to pay the premium and had a month thereafter, and that he stated so on the morning of his death; that he was about to send the check and that he had until the 15th of July to pay it; that is to refute their testimony.

Objection sustained.

MR. WARBURTON: I think we will offer to prove by this witness, that Mr. Stewart, on the morning of the day of his death was engaged in writing letters and that after he had finished, he said to Mrs. Stewart, that the premium on their policy was about due, but that he had a month's grace, which would carry the policy into August, but that he intended to pay the premium in the next day or so and did not reach it that morning.

MR. KEENAN: Same objection.

Objection sustained. Exception allowed.

On the 14th of June we were still at our home at that time. We were home all the month of June. My husband taught school part of the month of June, and after vacation, worked on the

little home. I do not recall when school was out, I think it was the 12th. We went on our vacation July 2nd. Practically, we were at home all times prior to July 2nd, yes, sir.

CROSS EXAMINATION.

During the month of June we did not take any vacation unless it was on Sunday. I do not know whether the notice came to the home.

BOTH SIDES RESTED.

5. MR. KEENAN: At the conclusion of all the testimony, defendant moves the Court to direct a verdict for the defendant, the Prudential Insurance Company of America, and to instruct the jury to return a verdict for the defendant.

Motion denied; exception allowed.

Plaintiff moves at this time that the Court direct the jury to return a verdict for the plaintiff for the sum of \$4,961.90, together with interest thereon at the rate of 6 per cent per annum from the 29th day of October, 1915, to the present date.

MR. KEENAN: Defendant objects to the motion of plaintiff for the reason that there are issues of fact, so far as the plaintiff is concerned, that must be passed upon by the jury, and defendant does not waive the submission of this case to the jury so far as plaintiff is concerned.

THE COURT: Upon what issue of fact?

MR. KEENAN. The issue of fact to be passed upon in any event would be that when the policy was delivered, the assured was fully apprized and notified of the terms and conditions of the policy which can bear but one construction, and that is

that it expired on the 19th day of June, the last day of grace.

THE COURT: You submit to the Court that this is the only issue of fact that you are asking to have submitted to the jury for trial? You have some question here about the citizenship of the plaintiff.

MR. KEENAN: No, there is no question about that. No, sir, I think substantially the only issue of fact, (aside from the written contract itself) is what was said and done at the delivery of the policy.

6. THE COURT: That is the way I understand it. I do not wish to hurry you into any admission, but I do not care to make any false assumption on just what the issue is. That is the way I understood the issue in the case all the way through. The plaintiff's motion for an instructed verdict will be granted. Gentlemen of the jury, this policy, to read this whole provision, "premium, \$12.70, payable on the delivery of this policy, and thereafter quarter-annually at the home office of the company, or as provided under the heading 'Provisions' on the second page hereof, in exchange for the company's receipt on or before the 19th day of February, May, August and November in every year during the continuance of this policy until ten full years' premiums shall have been paid or the prior death of the insured." Now, if we had nothing to go by but that language, some doubt might be admitted as to whether "quarter-annually" referred to after the date of the delivery of the policy and the payment of the first premium, or whether it referred to quarter dates afterwards,

that is the 19th day of February, May, August and November after payment, but, when you pause to consider the purpose of the transaction, that is that that first \$12.70 paid for something, if that was a quarter's insurance, then it is wholly unreasonable to conclude that the insurance company was taking something for nothing, that it was taking a quarter's insurance for thirty days' insurance. I, therefore, grant the plaintiff's motion, and instruct you to return a verdict in plaintiff's favor, the policy being for \$5000.00, and three of the quarter payments of the premium for that year not having been paid, that will be deducted from the \$5000.00, leaving, as I understand the calculation of counsel, \$4961.90, and then interest on that at 6 per cent. from October 29th, 1915 (interrupted.)

MR. WARBURTON: That amounts to \$173.60, the way we figure it.

THE COURT: Gentlemen of the jury, it will not be necessary for you to retire from the box to deliberate upon this verdict, but, as prepared by the court it reads, "Ada T. Stewart, plaintiff, vs. The Prudential Insurance Company of America, defendant. No. 1915. Verdict. We, the jury empanelled in the above entitled cause, find for the plaintiff, Ada T. Stewart, and against the defendant, the Prudential Insurance Company of America, in the sum of \$5135 & 50/100 Dollars, being instructed by the Court so to do." If you will ballot on your foreman in the box, the clerk will hand the verdict to whatever foreman you select.

Before the jury returned its verdict, defendant objected to the peremptory instruction of the

Court for plaintiff in charging the jury to return a verdict for the plaintiff upon the cause of action set forth in the complaint because it takes from the jury the consideration of defendant's evidence upon the question as to the interpretation placed upon the contract of insurance by the company and the insured at the time of the delivery and acceptance of the policy. It takes from the jury the right to pass upon the acts and conduct of both parties to the contract at the time of its final delivery and acceptance. It takes from the jury the right to pass upon the contract sued upon, which contract had entirely lapsed and ceased, as disclosed by the evidence offered, prior to the insured's death.

Which objection was over-ruled by the Court and an exception at the time allowed by the Court.

Whereupon, the jury elected a foreman, and without leaving the box returned a verdict in accordance with the instruction of the Court.

MR. KEENAN: I object to the instruction of the Court and to the receipt of the verdict of the jury.

Objection over-ruled and exception allowed.

Stay of proceedings for thirty days allowed.

Thereafter and in due time, defendant prepared, filed and served upon plaintiff its Petition for a New Trial upon the grounds therein stated, which petition came on regularly for consideration before the Court on June —, 1916, and after considering the same, said petition was denied and over-ruled, and an exception was taken by defendant and at the time allowed by the Court.

After service of the Summons and Complaint

in said action and in due and regular time, defendant interposed a Demurrer to said Complaint upon the ground and for the reason that said Complaint does not state a cause of action against the defendant; which Demurrer duly came on for argument before the Court and the same was overruled and denied in every particular, and an exception to such ruling was duly taken and at the same time allowed by the Court.

WHEREFORE, the defendant prays that this, its Bill of Exceptions, may be allowed, settled and signed.

S. A. KEENAN,
Attorney and Counsel for Defendant.

STATE OF WASHINGTON,
County of Pierce,—ss.

BE IT REMEMBERED, this cause coming on at this time duly and regularly to be heard in open court, being the day stipulated by counsel for respective parties for the settlement and certification of the Bill of Exceptions in the foregoing entitled action pursuant to due notice, both parties being present by their respective counsel:

Therefore, I, Edward E. Cushman, Judge of the United States District Court of the United States for the Western District of Washington, Southern Division, the Judge before whom said cause was tried, do hereby certify that the matters and proceedings contained in the foregoing Bill of Exceptions are matters and proceedings occurring in said cause, and the same are hereby made a part of the record herein, and that the same contains all the material facts, matters, pro-

ceedings heretofore occurring, and the evidence received in said cause, not already a part of the record herein.

I do hereby further certify that the foregoing Bill of Exceptions contains all the evidence and testimony adduced upon the trial of said cause, together with all objections and exceptions made and taken, at the time, to the admission or exclusion of testimony, and all motions, offers to prove, and admissions and rulings thereon, and all objections and exceptions taken and allowed at the time of the respective rulings, and that the exhibits herein mentioned and hereto attached are all the exhibits adduced upon the trial of said cause.

Done in open court this 29th day of June, A. D. 1916, and during the term of said court at which said cause was tried and determined.

EDWARD E. CUSHMAN,
Judge of said Court.

Exhibit B, Application for Insurance.
Received, Feb. 13, 1915.

MEDICAL DEPARTMENT

Approved Feb. 13, 1915, by J. E. B.

P. R. B. B. 2/3 No. J 2/13.

ORDINARY APPLICATION DEPARTMENT.

Inspection.

Approved Feb. 18, 1915. B. U. H. O. A. D.

No. Discl. Rules modified.

Memorandum:

Received Hold for R. M. H. 2/15.

A. H. 2/15.

B. P. Case. If H. T. remit \$5.00 Med. fee
to Oe.

FOR USE OF HOME OFFICE ONLY

To Be Filled in by Manager or Detached Special Agent. Questions on Reverse Side Applicable to Case Must Be Answered.

Give date on which examination was ordered

-----, 191--

District, Tacoma.

(Seal) Forrest F. Dryden, President.

Who is entitled to the Commission? A. R. Yantis.

Under Asst. Supt. A. R. Yantis.

J. D. Dale, Superintendent, Agency Organizer, Detached Assistant.

Application for Insurance in
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,

Home Office, Newark, New Jersey.
Incorporated under the laws of the State of Jersey.

NUMBER 1919116.

1. What is your full name? (Please print.)
ERNEST C. STEWART.

2. What is your present occupation or occupations? Teacher.

3. What are your exact duties? Teaching Manual Training.

4. How long have you been so engaged? Three.

5. Are you engaged in or have you any intention of engaging directly or indirectly in aviation or submarine work? No.

6. Do you intend living or traveling in Alaska or any other possessions of the United States, or in any country except the United States or Canada? If so, give particulars. No.

7. Are you now insured in this or any other company or association? Give full particulars. If in this Company, give policy numbers also.

8. Where were you born? (State or Country.) Missica.

9. When were you born? (Month, day and year.) March 30, 1884.

10. Age nearest birthday? 31.

11. Are you married? Yes.

12. What kind of policy is desired? (Use such terms as Whole Life, 20-Payment Life, 20-Year Endowment, etc. If Intermediate, so state in specifying kind.) Ten Year Term.

13. To whom is this insurance to be payable at your death? (Full name. Please print.) ADA T. STEWART.

Age of Beneficiary, 26.

Relationship to Applicant, Wife.

Present residence, 947 So. Sprague.

14. Residence:

No. 947 So. Sprague Street.

City or Town, Tacoma.

County, Pierce. State, Wash.

15. Business Address:

City or Town, Tacoma. State, Wash.

Name of firm or employer, Tacoma Public Schools.

Nature of business, Teacher.

16. To what address are premium notices or other communications to be sent? (If this question is not answered they will be sent to the residence address.) 947 So. Sprague.

17. Where have you lived during past three years? Wash.

18. Has any company or association ever de-

clined to grant insurance on your life? If answer is yes, give name of company and date. No.

19. Has any company or association ever modified your application either in amount, kind or premium? If so, give name of company, date, and nature of modification. No.

20. Are you negotiating, or have you applied for other insurance on your life at this time in this or any other company or association? If so, give name of company or association and amount. No.

21. NOTE.—State here any request in connection with the insurance proposed. P S Ensert Disibility Clase.

22. Amount of insurance? \$5000.

23. Is premium to be paid annually, semi-annually or quarterly? Quarterly.

24. What amount have you paid in advance on account? C. O. D.

25. Do you wish the privilege of changing the beneficiary? Answer yes or no. Yes.

I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I agree that the foregoing, together with this declaration, as well as the statements and answers made or to be made to the Company's Medical Examiner, shall constitute the application and become a part of the contract of insurance hereby applied for, and it is further agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in

full, while my health, habits and occupation are the same as described in this application.

Witness to Applicant's signature:

A. R. YANTIS.

Full signature of the person whose life is to be insured:

ERNEST C. STEWART.

Dated at Tacoma, Wash., this 26th day of Jan., 1915.

“EXHIBIT A.”

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA.

In Consideration of the Application for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby insures the life of the person herein designated as the Insured, for the amount named herein, payable as specified, subject to the privileges and provisions on the second and third pages hereof, which are hereby made part of this contract.

The Insured: Ernest C. Stewart.

Amount of Insurance: Five Thousand Dollars, payable immediately upon receipt of due proof of the death of the Insured within ten years from the date of this Policy, while in force, at the Home Office of the Company, in Newark, New Jersey.

Payable to Ada T. Stewart, Beneficiary, Wife of the Insured, if the Beneficiary survive the Insured, otherwise to the executors, administrators or assigns of the Insured.

Premium: Twelve and 70/100 Dollars, payable on the delivery of this Policy and thereafter quarter-annually at the Home Office of the Company, or as provided under the heading "Provisions" on the second page hereof, in exchange for the Company's receipt on or before the nineteenth day of February, May, August and November, in every year during the continuance of this Policy, until ten full years' premiums shall have been paid, or until the prior death of the Insured.

In Witness Whereof, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this nineteenth day of February, one thousand nine hundred and fifteen.

FORREST F. DRYDEN,
President.

Attest:—WILLARD I. HAMILTON.

Age 31.

5120—55g Ten-Year Term Policy—Non-participating.

Convertible Within Seven Years.

Premiums Payable for Ten Years.

Policy Void Ten Years After Date—Convertible but Non-renewable.

SPECIAL PRIVILEGES.

Grace in Payment of Premiums.—In the payment of any premium under this Policy, except the first, a grace of one month (not less than thirty days) without interest will be allowed, during which time the Policy will remain in force.

Revival of Policy.—If this Policy be lapsed for non-payment of premium it will be revived any time after the date of lapse, provided the term has not expired, upon written application and payment of arrears of premiums with interest at the rate of five per cent. per annum, together with the reinstatement of all indebtedness, and provided evidence of the insurability of the Insured satisfactory to the Company be furnished.

Change of Beneficiary.—The Insured may at any time while this Policy is in force, by written notice to the Company at its Home Office, change the Beneficiary or Beneficiaries under this Policy, such change to take effect only upon endorsement of the same on the Policy by the Company, whereupon all rights of the former Beneficiary or Beneficiaries shall cease; provided, however, that the Insured shall have attained to majority according to the laws of the State in which the Insured resides, and that no such change of Beneficiary shall be valid if the Policy or any interest therein be assigned at the time of such change.

Instalment Privilege.—The amount insured under this Policy is payable in one sum, but, if the amount payable be not less than \$1,000, it may be made payable instead in equal annual instalments in any number from two to twenty-five, or may be made payable to the Beneficiary, if such Beneficiary be one natural person, in equal annual instalments to continue for twenty years and so long thereafter as the Beneficiary shall live.

The amount of such instalments shall be based upon the amount insured under this Policy and shall be determined from the tables given below.

INSTALLMENTS—FROM TWO TO TWENTY-FIVE.

Number of Installments	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Amount of each Installment per \$1,000	\$509	\$345	\$263	\$214	\$181	\$158	\$141	\$127	\$116	\$107	\$100	\$94	\$88	\$84	\$80	\$76	\$73	\$70	\$68	\$66	\$64	\$63	\$60	\$59

INSTALLMENTS—CONTINUOUS.

Age last birthday of Beneficiary at death of Insured	16 and Under	17 to 21	22 to 24	25 to 27	28 to 30	31 and 32	33 and 34	35 and 36	37 and 38	39 and 40	41 and 42	43	44 and 45	46	47 and 48	49	50 and 51	52	53 and 54	55 and 56	57	58 and 59	60 and Over
Amount of each Installment per \$1,000	\$44	\$45	\$46	\$47	\$48	\$49	\$50	\$51	\$52	\$53	\$54	\$55	\$56	\$57	\$58	\$59	\$60	\$61	\$62	\$63	\$64	\$65	\$66

Trust Fund Privilege.—At the time this Policy becomes payable as a claim the amount insured, or any portion thereof not less than \$1,000, may be left during the lifetime of the Beneficiary in trust with the Company, and the Company will pay thereon, so long as the said amount or said portion thereof remains with the Company, interest at the rate of three and one-half per cent. per annum. The said Trust Fund shall be paid at the death of the Beneficiary to the executors, administrators or assigns of the Beneficiary, but may be withdrawn at any time with accrued interest. The Trust Fund Privilege shall be inoperative if the amount payable under this Policy be less than \$1,000 or if the Beneficiary be a corporation or a firm.

Convertible Into Any Other Regular Form of Policy.—At any time within seven years from its date this Policy, if then in force, may be converted, upon written application of the Insured, and legal surrender of said Policy to the Company, into any other form of Policy issued by the Company and in current use on the date given such new Policy, exclusive of a policy on the Term or the Continuous Annual or the Continuous Monthly Income plan, provided:

That such new Policy shall bear any date from the date of this Policy up to and including the date of the application for conversion as the Insured may direct;

That the amount or commuted value of such new Policy shall not exceed the amount of this Policy;

That such new Policy shall be subject to the payment from its date, in accordance with its terms, of the Company's regular premium charged for such a Policy at such date at the age of the Insured on such date;

That there shall be paid to the Company arrears in premiums under such new Policy at the time of actual conversion, with compound interest at the rate of five per cent. per annum from the due dates of such arrears to the date of the application for conversion, and that in computing such arrears credit shall be allowed the Insured for the premiums actually paid under this Policy since the date of the new Policy, and such credit shall be in the proportion that the amount or commuted value of the new Policy bears to the amount of this Policy; and

That no medical re-examination shall be required at time of such conversion except when application is made for a policy with provision for exemption of payment of premiums in event of total and permanent disability.

PROVISIONS.

Payment of Premiums.—This Policy is based upon the payment of premiums annually in advance, but if premiums be made payable in quarterly or semi-annual instalments, any future instalments of the premium for the current policy year remaining unpaid at the maturity of the Policy shall be considered an indebtedness to the Company on account of this Policy. Premiums

are payable at the Home Office of the Company, but may be paid to an agent of the Company on or before the dates when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company. If any premium be not paid when due, this Policy shall be void and all premiums forfeited to the Company, except as herein provided.

Indebtedness.—Any indebtedness to the Company on account of this Policy will be deducted in any payment or payments or in any settlement under this Policy.

Modifications, etc.—No condition, provision or privilege of this Policy can be waived or modified in any case except by an endorsement hereon signed by the President, one of the Vice Presidents, the Secretary, one of the Assistant Secretaries, the Actuary, the Associate Actuary or one of the Assistant Actuaries. No modification or change shall be made in this Policy except such as is in accordance with the law of the State in which the same is issued. No Agent has power in behalf of the Company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the Company by making any promise, or making or receiving any representation or information.

Assignments.—If this Policy shall be assigned, the assignment must be in writing, and the Company shall not be deemed to have knowledge of such assignment unless the original or a duplicate thereof is filed at the Home Office of the Company. The Company will not assume any responsibility for the validity of an assignment.

Suicide.—If within *one year* from the date hereof the Insured shall die by suicide—whether sane or insane—or in consequence of his (or her) own criminal action, the liability of the Company shall not exceed the amount of the premiums paid on this Policy.

Incontestability.—This Policy shall be incontestable after one year from its date, except for non-payment of premium.

Misstatement of Age.—If the age of the Insured be misstated the amount payable under this Policy shall be such as the premium would have purchased at the correct age.

Entire Contract Contained in This Policy.—This Policy together with the Application, a copy of which is attached hereto, contains and constitutes the entire contract between the parties hereto, and all statements made by the Insured shall in the absence of fraud be deemed representations and not warranties, and no such statement shall avoid the Policy or be used as a defence to a claim thereunder unless it be contained in the Application for the Policy and unless a copy of such Application be endorsed upon or attached to the Policy when issued.

NON-FORFEITURE PRIVILEGES.

Paid-up Term Policy.—If this Policy, after being in force three full years, shall lapse or become forfeited for the non-payment of any premium on the date when due, as specified on the first page hereof, and if the Policy be not surrendered in exchange for any other regular form of Policy, as specified in the Special Privilege, “Convertible Into Any Other Regular Form of Policy,” above, the Com-

pany will issue a non-participating Paid-up Term Policy, for an amount less than the amount insured by this Policy, as specified in the following table, to expire at the same time as this Policy, upon the legal surrender of this Policy within three months after the date to which premiums have been duly paid.

Automatic Extended Insurance.—If this Policy, having lapsed or become forfeited as specified in the clause, “Paid-up Term Policy,” above, be not surrendered in exchange for any other regular form of Policy, as specified in the Special Privilege, “Convertible Into Any Other Regular Form of Policy,” above, or for a Paid-up Term Policy as specified in the clause entitled, “Paid-up Term Policy,” the Company will write in lieu of this Policy, *without any action on the part of the Insured*, a non-participating Paid-up Term Policy for the full amount insured by this Policy, such Paid-up Term Policy to be dated on the day to which premiums have been duly paid, and to continue in force for the term indicated by the following table of Automatic Extended Insurance. Such Paid-up Term Policy will be delivered on the legal surrender of this Policy.

Cash Surrender Values Under Paid-up Term Policies.—If this policy shall lapse, as above, and a Paid-up Term Policy as specified in either of the Non-forfeiture Privileges, “Paid-up Term Policy,” or “Automatic Extended Insurance,” above, be issued in lieu thereof, such Paid-up Term Policy may be surrendered at any time for its full reserve value at the time of such surrender.

TABLE ABOVE REFERRED TO.

The amounts stated in the column of the following table headed "Paid-up Term Policy for \$1,000" apply to an original policy of \$1,000. As this Policy is for \$5,000, the Paid-up Term Policy available in any year will be five times the amount stated in said column for that year. The terms of automatic extended insurance apply to the face amount of this policy.

(To expire at the same time as this policy.)

At the End of	Paid-up Term Policy	Automatic Extended Insurance
1 Year	None	None
2 Years	None	None
3 "	\$19.00	0 Years, 45 Days
4 "	26.00	0 Years, 53 Days
5 "	33.00	0 Years, 57 Days
6 "	40.00	0 Years, 56 Days
7 "	47.00	0 Years, 51 Days
8 "	55.00	0 Years, 39 Days
9 "	62.00	0 Years, 30 Days
10 "	Policy Expires	

The surrender values in the above table are based upon the American Experience Table of Mortality with three and one-half percent. interest per annum, and the net value of any such surrender value is at least equal to the entire reserve on this Policy, according to the foregoing standard, less a percentage (not more than two and one-half) of the amount insured by the Policy.

If the premiums of this policy be paid in quarterly or semi-annual instalments, due allowance will be made in computing benefits from the above table for that portion of a year's premium paid over and above the full number of years' premiums indicated.

PETITION FOR WRIT OF ERROR.

(Omitting Title.)

To the Honorable Edward E. Cushman, Judge of the United States District Court aforesaid:

Now comes the Prudential Insurance Company of America, a corporation, by attorney, and respectfully shows that on the 31st day of May, A. D. 1916, the Court directed a verdict against your petitioner and in favor of the plaintiff, and upon said verdict a final judgment was entered on the — day of June, A. D. 1916, against your petitioner, defendant, the Prudential Insurance Company of America.

Your petitioner feeling itself aggrieved by the said verdict and judgment entered thereon, herewith petitions the Court for an order allowing him to prosecute a Writ of Error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a Writ of Error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting in the City of San Francisco, California, in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error condition as the law directs, and upon giving such bond as may be required that all former proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

Dated at Seattle, Washington, June 26th, A. D. 1916.

S. A. KEENAN,

Attorney for Petitioner in Error.

(Filed June 29, 1916.)

ORDER ALLOWING WRIT OF ERROR.

(Omitting Title.)

On this 29th day of June, A. D. 1916, came the defendant by his attorney, and filed herein and presented to the court his petition praying for the allowance of a writ of error, and Assignments of Error intended to be urged by it, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit and that such other and further proceedings may be had as may be proper in the premises: on consideration thereof, the Court does allow the Writ of Error upon the defendant giving a bond according to law in the sum of \$6,500, which shall operate as a super-sedeas bond.

Done in open court this 29th day of June, A. D. 1916.

EDWARD E. CUSMAN,

(Filed June 29, 1916.)

Judge.

WRIT OF ERROR.

(Omitting Title.)

United States of America, S. S.

The President of the United States, Woodrow Wilson, to the Honorable Judge of the District Court of the United States for the Western Dis-

trict of Washington, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between Ada T. Stewart, defendant in error, and Prudential Insurance Company of America, a corporation, plaintiff in error, a manifest error has happened to the damage of the plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the United States Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. Edward Douglas White, Chief Justice of the United States, this 29th day of June, A. D. 1916.

FRANK L. CROSBY,

Clerk of the United States District
Court for the Western District of
the State of Washington.

By F. M. HARSHBERGER,
Deputy Clerk.

(Seal of the U. S. District Court, Western District of Washington.)

Allowed this the 29th day of June, A. D. 1916.

EDWARD E. CUSHMAN,

(Filed June 29, 1916.)

Judge.

CITATION ON WRIT OF ERROR.

(Omitting Title.)

UNITED STATES OF AMERICA,

District of Washington,—ss.

To Ada T. Stewart and S. Warburton and Boyle, Brockway & Boyle, your attorneys of record: GREETING.

You are herby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Washington, wherein Prudential Insurance Company of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Seattle, in said District, this 26th day of June, in the year of our Lord, one thousand nine hundred and sixteen.

EDWARD E. CUSHMAN,

(Filed June 29, 1916.)

Judge.

Personal service admitted by counsel for defendant in error on June 30, 1916.

ASSIGNMENTS OF ERROR.

(Omitting Title.)

Now comes the Prudential Insurance Company of America, plaintiff in error, in the above numbered and entitled cause, and in connection with its petition for a Writ of Error in this cause assigns the following errors which plaintiff in error avers occurred on the trial thereof, and upon which it relies to reverse the judgment entered herein as appears of record:

First. The Court erred in overruling the demurrer interposed by the defendant to the complaint of the plaintiff, which demurrer was duly and seasonably served and filed in this cause, and to the overruling of which, the defendant, at the time duly excepted, and an exception was duly allowed by the court; the ground of said demurrer being that said complaint does not state facts sufficient to constitute any cause of action against defendant.

Second. At the commencement of the trial of said cause and prior to the reception of any testimony, plaintiff in error objected to the introduction of any testimony on the part of defendant in error for the reason that said complaint did not state a cause of action against plaintiff in error. That the Court erred in overruling said objection, to which action of the Court an exception was duly taken and allowed at the time.

Third. The Court also erred in denying the motion of plaintiff in error for judgment on the pleadings, which motion was also made prior to the commencement of said trial; to which ruling an exception was duly taken and allowed by the Court at the time.

Fourth. The Court erred in denying defendant's motion for a directed verdict in favor of defendant at the close of plaintiff's case; to which ruling plaintiff in error, at the time, duly excepted, and the exception was allowed.

Said motion was based upon the ground that defendant in error failed to offer any testimony or proof that entitled her to judgment against plaintiff in error; and furthermore, it appeared from the evidence and testimony offered by defendant in error that the contract of insurance had lapsed prior to the death of the insured.

Fifth. The Court erred in denying the motion of plaintiff in error for a directed verdict in its favor at the conclusion of all the testimony offered on the trial. To which ruling plaintiff in error at the time duly excepted and an exception was allowed.

The grounds of said motion were that the testimony wholly failed to establish any cause of action whatever in favor of the defendant in error; that the testimony and evidence offered, conclusively established the fact that plaintiff in error was in no wise liable to the plaintiff on the contract of insurance set out in her complaint; and furthermore, that the testimony and evidence offered on the trial proved that the contract of insurance set out in the complaint had lapsed and ceased to be a contract for any purpose prior to the insured's death.

Sixth. The Court erred in granting the motion of defendant in error for a directed verdict in her favor at the conclusion of all the testimony offered on the trial. To which ruling plaintiff in error at the time duly excepted, and an ex-

ception was allowed. Said ruling was erroneous, among others, on the following grounds: it was established by the evidence that defendant in error failed to establish her cause of action and also failed to establish the existence of any contract, of insurance, or otherwise, by which plaintiff in error was in any wise liable to defendant in error; and further, because it was established by the proof that the said contract of insurance had wholly lapsed and ceased to be in force for any purpose prior to the insured's death for the non-payment of premium as provided therein.

Seventh. The Court erred in accepting and recording the verdict of the jury for the reason and upon the grounds hereinbefore set out. To which ruling the plaintiff in error, at the time, duly excepted, and an exception was allowed.

Eighth. The Court committed error in the abuse of its discretion wherein it denied the petition of plaintiff in error for a new trial on each and all the grounds in said petition set out; to which ruling plaintiff in error at the time duly excepted and an exception was allowed.

Ninth. The Court erred in its refusal to hold that all the evidence offered on said trial was sufficient to sustain a judgment in favor of defendant in error and against plaintiff in error; to which rulings, plaintiff in error at the time duly excepted, and exceptions were allowed.

That said evidence was insufficient to justify the verdict and judgment for the following reasons: The following are all the facts established by the evidence received on said trial.

(a) The policy of insurance and application set out and annexed to the complaint of defendant

in error. The policy is dated February 19th, 1915. The first premium of \$12.70 was due and payable on the delivery of the policy; the next payment on May 19th, 1915.

(b) The plaintiff testified that the insured died July 19th, 1915. That he did not pay the first premium nor receive the policy of insurance until April 15th, 1915; that the premium due May 19th, 1915, was not paid. According to the terms of the policy the last day of grace for the payment of the premium due May 19th, 1915, was June 19th, 1915.

It is established by the testimony of Alfred Yantis, the agent who solicited the insurance, that on the 26th day of February, 1915, and within five days after the policy was mailed from the Home Office, he went to the home of the plaintiff and her husband, the insured, and tendered the policy to them; that the insured was not able to pay the first premium and requested the company to hold the policy until he got some money which he was expecting, when he would call and pay the first premium. The policy was returned to the office. According to the testimony of John D. Dole, the local superintendent of the company, the insured called at the company's office in Tacoma on April 15th, and paid the first premium; at that time the insured's attention was directed to the fact that the next premium would be due on the 19th of May. He said he knew that and that he would take care of it by that time. The first page of the policy was read over and fully explained to him, and his attention was especially called to the dates on which the premiums would mature. His attention was directed to the fact that the payment

of the first premium in April in no manner affected the payment of the next premium due May 19th, and the insured remarked that he understood that. From this testimony it is apparent that the insured interpreted the contract as providing for the payment of the second premium, as stated in the terms of the policy, on May 19th, 1915.

Tenth. The Court erred in peremptorily instructing the jury to return a verdict in favor of the defendant in error as follows: The plaintiff's motion for an instructed verdict will be granted. Gentlemen of the Jury, this policy, to read this whole provision, "premium \$12.70, payable on the delivery of this policy, and thereafter quarter-annually at the home office of the company, or as provided under the heading, 'Provisions' on the second page hereof, in exchange for the company's receipt on or before the 19th day of February, May, August and November in every year during the continuance of this policy until ten full years' premiums shall have been paid or the prior death of the insured." Now, if we had nothing to go by but by that language, some doubt might be admitted as to whether "quarter-annually" referred to after the date of the delivery of the policy and the payment of the first premium, or whether it referred to quarter dates afterwards, that is the 19th day of February, May, August and November after payment, but, when you pause to consider the purpose of the transaction, that is that that first \$12.70 paid for something, if that was a quarter's insurance, then it is wholly unreasonable to conclude that the insurance company was taking something for nothing, that it was taking a quar-

ter's insurance for thirty days' insurance. I, therefore, grant the plaintiff's motion, the policy being for \$5000.00, and three of the quarter payments of the premium for that year not having been paid, that will be deducted from the \$5000.00, leaving, as I understand the calculation of counsel, \$4961.90, and then interest on that at 6 per cent. from October 29th, 1915; to which the plaintiff in error at the time excepted and the exception was allowed.

Eleventh. The Court erred in signing entry and docketing the judgment in said cause against the plaintiff in error and in favor of defendant in error. To which action of the Court, plaintiff in error at the time excepted and the exception was allowed.

WHEREFORE, plaintiff in error prays that the judgment of said Court be reversed, and that judgment be directed to be entered therein in favor of the plaintiff in error and against the defendant in error for the dismissal of said cause.

Dated at Seattle, Washington, June 29, A. D. 1916.

S. A. KEENAN,
Attorney for Plaintiff in Error,
Seattle, Washington.

(Filed June 29, 1916.)

SUPERSEDEAS AND COST BOND.

(Omitting Title.)

KNOW ALL MEN BY THESE PRESENTS that we, the Prudential Insurance Company of America, a corporation, and the American Surety Company, a corporation, organized under the laws of the State of New York, of New York, and

authorized to transact business of surety in the State of Washington, as surety, are held and firmly bound unto Ada T. Stewart, defendant in error, in the full and just sum of Six Thousand Five Hundred Dollars (\$6,500.00) to be paid to the said Ada T. Stewart, her attorneys, successors, administrators, executors, or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors and administrators, jointly and severally by these presents.

Signed and dated this the 29th day of June, A. D. 1916.

Whereas lately at a regular term of the District Court of the United States for the Western District of Washington, sitting at Tacoma, in said District, in a suit pending in said court between Ada T. Stewart as plaintiff and Prudential Insurance Company of America, a corporation, as defendant, cause No. 1915, on the law docket of said court final judgment was rendered against the said Prudential Insurance Company of America, a corporation, for the sum of Five Thousand One Hundred Thirty Five Dollars and Fifty Cents (\$5,135.50) and costs and disbursements therein with interest thereon at the rate of six per cent, and the said Prudential Insurance Company of America has obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said Ada T. Stewart, defendant in error, citing her to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco in the State of California

according to law within thirty (30) days from the date hereof.

Now the condition of the above obligation is such that if the said Prudential Insurance Company of America shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

Signed: PRUDENTIAL INS. CO. OF AMERICA,
By S. A. KEENAN, Its Attorney.

AMERICAN SURETY CO. OF NEW YORK,

B. S. H. MURSSEY,
Resident Vice-President.

FOREST BARRY,
Resident Assistant Secretary.

Approved this the 29th day of June, A. D.
1916.

EDWARD E. CUSHMAN,
(Filed June 29, 1916.) Judge.

**STIPULATION OF CONTENTS OF THE TRANSCRIPT OF
RECORD.**

(Omitting Title.)

It is hereby stipulated and agreed by and between the parties to the above entitled cause by their respective counsel that the following shall constitute the transcript of the record to be transmitted by the Clerk of the District Court to the Circuit Court of Appeals, to wit:—

1. Plaintiff's Complaint;
2. Process and Return;

3. Defendant's Demurrer to the Complaint;
4. Order Overruling Demurrer and Exception to Such Order;
5. Plaintiff's Reply;
6. Defendant's Motion to Strike Certain Portions of Reply;
7. Order Sustaining Motion Striking Certain Portions of Reply;
8. Impaneling Jury;
9. Verdict;
10. The Judgment;
11. Order Extending Time to June 30th, 1916, in which to Prepare, Serve and File Defendant's Proposed Bill of Exceptions;
12. Sitpulation for Settlement of Bill of Exceptions;
13. Bill of Exceptions;
14. Petition for Writ of Error;
15. Assignment of Errors;
16. Bond and Approval;
17. Order Allowing Writ of Error;
18. The Writ of Error;
19. Citation in Error with Proof of Service Thereof;
20. Plaintiff's Exhibit I, the Policy of Insurance;
21. Plaintiff's Exhibit A, application for policy of insurance.
22. Clerk's Certificate.

Dated at Seattle, Washington, July 6th, 1916.

S. A. KEENAN,

Attorney for Plaintiff in Error.

S. WARBURTON,

BOYLE, BROCKWAY & BOYLE,

Attorneys for Defendant in Error.

(Filed July —, 1916.)

STIPULATION.

(Omitting Title.)

WHEREAS in the Stipulation heretofore entered into designating the papers and proceedings to be included in the transcript of the record forwarded in response to the Writ of Error issued in this case, there were inadvertently omitted therefrom the following papers:

Amended Answer,

Petition for a New Trial,

Order overruling Petition and Motion for a New Trial, and Exception Allowed.

IT IS THEREFORE, HEREBY STIPULATED, That the Clerk of the United States District Court prepare and forward to the Clerk of the United States Circuit Court certified copies of said papers and proceedings, and that the same be incorporated in and made a part of the record heretofore transmitted by said Clerk; and

IT IS FURTHER AGREED, That an Order may be made in accordance with this Stipulation.

Dated at Seattle, Washington, August 11th,
1916.

S. A. KEENAN,
Attorney for Plaintiff in Error.
S. A. Warburton,
Boyle, Brockway & Boyle,
Attorneys for Defendant in Error.

ORDER.

On reading and considering the foregoing Stipulation, and this appearing a proper case for such an Order:

IT IS HEREBY ORDERED That the Clerk of this court incorporate in and make them a part of the record, the Amended Answer, Petition for a New Trial and Order denying the same, upon the receipt of certified copies thereof from the Court below.

WILLIAM W. MORROW,
Judge.

STIPULATION.

(Omitting Title.)

Whereas the greater portion of the application for insurance and all of the medical examination is deemed immaterial to the case presented in this court: IT IS HEREBY STIPULATED AND AGREED by and between the parties to this action that the following parts of the insurance contract be included in the printed record in this case, to wit:—

The entire insurance policy;

The first page of the application for insurance.

IT IS FURTHER STIPULATED that in printing the record in this case, the title of the

case wherever it appears may be omitted as well as all verifications and acknowledgments on the various instruments offered and received in evidence.

Plaintiff in Error, however, reserves the right to have the entire insurance contract included in the printed record if the Court so desires.

Dated August 12th, 1916.

S. A. KEENAN,
Attorney for Plaintiff in Error.

S. WARBURTON,
BOYLE, BROCKWAY & BOYLE,
Attorneys for Defendant in Error.

STIPULATION.

(Omitting Title.)

It is hereby stipulated and agreed by the parties to the above entitled case, through their respective counsel, that the printed transcript in this case consist of the following, it being deemed by both parties that the same comprise all parts of the record in any way material to its consideration in this court, to wit:—

1. Plaintiff's Complaint;
2. Demurrer to Complaint;
3. Order overruling Demurrer and exception thereto;
4. Amended and Substituted Answer;
5. Reply;
6. Motion to strike from Reply;
7. Order sustaining Motion to strike from Reply;
8. Impanelment of jury;

9. Verdict;
10. Judgment;
11. Petition for a new trial;
12. Order denying Petition for a new trial;
13. Order extending time for serving and filing Bill of Exceptions;
14. Stipulation for settlement of bill of exceptions;
15. Order settling Bill of exceptions;
16. Bill of Exceptions, (excepting the policy of insurance and application for insurance, annexed thereto, the material parts of which will appear subsequently in said transcript);
17. Petition for writ of error;
- 17½. Order for Writ of Error;
18. Writ of error;
19. Citation with proof of service;
20. Assignment of errors;
21. Bond on writ, and approval;
22. Stipulation as to contents of record;
23. Clerk's Certificate to transcript;
24. Stipulation as to contents of printed record;
25. Stipulation and order, adding to the transcript as originally certified;
26. Plaintiff's Exhibit "A" and Defendant's Exhibit A being material parts of the application of insurance and the policy of insurance, annexed to Plaintiff's Complaint, offered in evidence on the trial, and annexed to the Bill of Exceptions;

27. Stipulation specifying the portions of the policy of insurance and application for insurance to be printed in this record;

28. Order extending time for filing transcript.

It is further stipulated and understood by both parties, that in the event the Court should deem it necessary to have the policy of insurance and the application printed in full in the record, then and in that event, the Plaintiff in Error reserves the right to have the same printed and inserted as the Court may direct.

Dated at Seattle, Washington, August 9th, 1916.

S. A. KEENAN,
Attorney for Plaintiff in Error.

S. WARBURTON,
BOYLE, BROCKWAY & BOYLE,
Attorneys for Defendant in Error.

ORDER ENLARGING TIME TO FILE TRANSCRIPT.

(Omitting Title.)

Now on this 26th day of July, 1916, for good cause shown, IT IS ORDERED that the defendant's time for filing and docketing the record on Writ of Error in this cause in United States Circuit Court of Appeals, Ninth District, be and the same is hereby enlarged and extended up to and including August 5th, 1916.

EDWARD E. CUSHMAN,
(Filed July 26, 1916.) Judge.

CLERK'S CERTIFICATE TO TRANSCRIPT.

UNITED STATES OF AMERICA,)
 WESTERN)ss.
 DISTRICT OF WASHINGTON.)

I, FRANK L. CROSBY, Clerk of the United States District Court of the Western District of Washington, do hereby certify and return that the foregoing is a full, true and correct transcript of the record and proceedings in the above cause, as the originals thereof appear on file in my office in said District, at Tacoma, made pursuant to the stipulation of counsel filed herein, and that the same constitutes the return on the Writ of Error.

I further certify that the following is a full, true and correct statement of all expenses, costs and fees and charges incurred and paid in my office by and on behalf of the Plaintiff in Error for making the preceding record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees (Sec. 828 R. S. U. S.),	130	
folios at 15c-----		\$19.50
Certificate of Clerk to this transcript-----		.30
Seal to said certificate-----		.20

ATTEST my official signature and the seal of this Court, at Tacoma, in said District, this 24th day of August, A. D. 1916.

(Seal)

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,	}	No.
<i>Plaintiff in Error,</i>		
vs.		
ADA T. STEWART,	}	
<i>Defendant in Error.</i>		

IN ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *District Judge.*

Brief for Plaintiff in Error

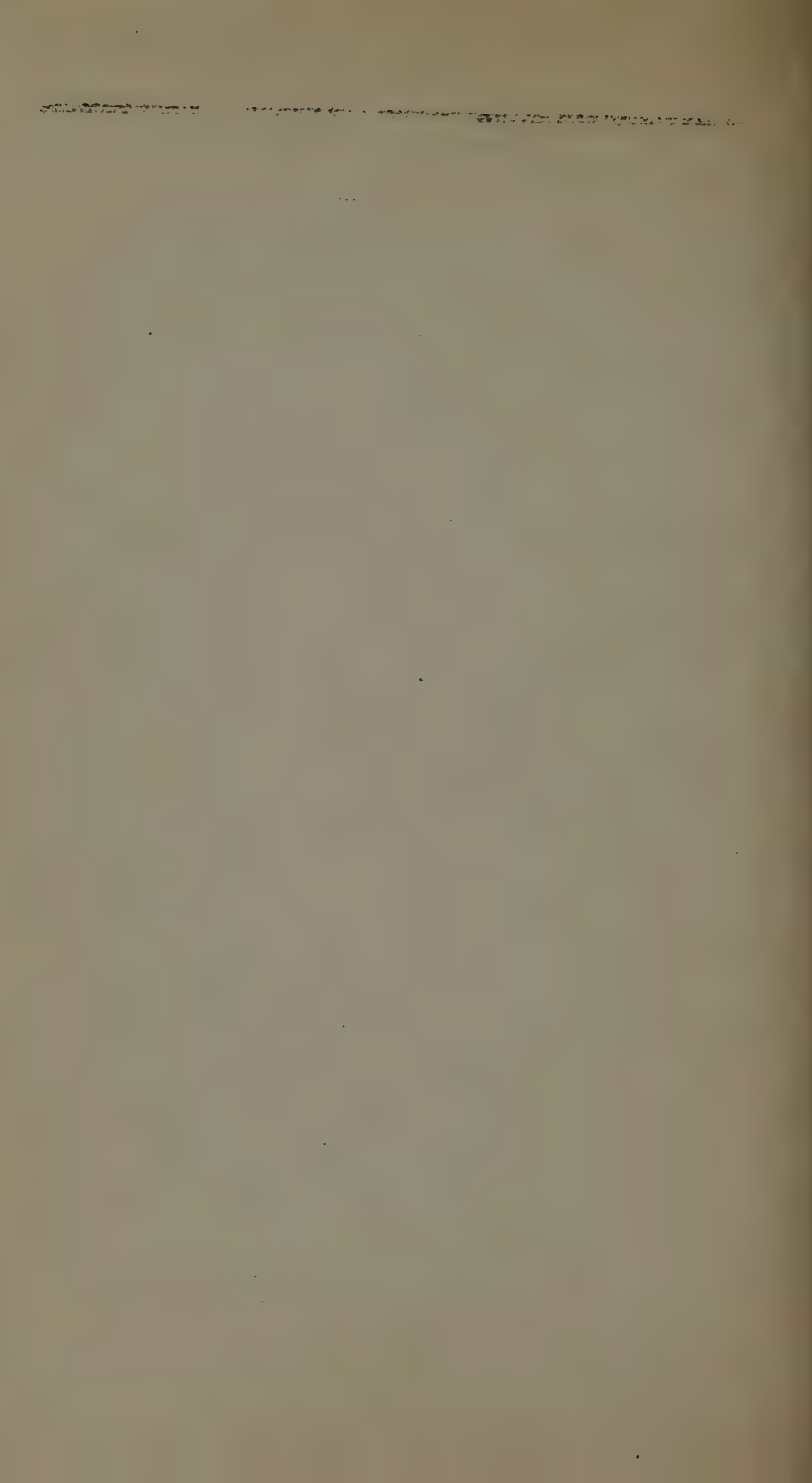
Filed

AUG 30 1916

S. A. KEENAN,

Attorney for Plaintiff in Error,

Empire Bldg., Seattle, Wash.



IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,

Plaintiff in Error,

vs.

ADA T. STEWART,

Defendant in Error.

No. 1915

IN ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *District Judge.*

Brief for Plaintiff in Error

S. A. KEENAN,

Attorney for Plaintiff in Error,

Empire Bldg., Seattle, Wash.

CASES CITED.

	PAGE
Anderson v. Mut. Life Ins. Co.-----	20
Bryan v. Nat. Life Ins. Co.-----	30
Cyc., Vol. 25-----	30
Forch et al. v. Western Life Indemnity Co.----	27
Goodwin v. Provident Sav. Life Assur. Soc.---	19
Halsey v. Amer. Central Life Ins. Co.-----	30
Home Ins. Co. v. Myers-----	15
Imperial Fire Ins. Co. v. County of Coos-----	32
Ins. Co. v. McKay-----	30
Jewett v. Northwestern Nat. Life Ins. Co.----	26
Johnson v. Mutual Benefit Life Ins. Co.-----	35
Klein v. N. Y. Life Ins. Co.-----	37
Methvin v. Fidelity Mut. Life Ins. Assn.-----	24
M'Connell v. Provident Savings Life Assur. Soc. -----	23
Mutual Life Ins. Co. v. Kelley-----	15
McMasters v. N. Y. Life Ins. Co.-----	31
New York Life Ins. Co. v. Fletcher-----	15
Nederland Life Insurance Co. v. Meinert-----	21
Pense v. Assurance Co.-----	30
Rayburn v. Pennsylvania Casualty Co.-----	18
Rose v. Mut. Life Ins. Co.-----	27
Standard Life & Accident Co. v. McNulty-----	16
Stinchcombe v. N. Y. Life Ins. Co.-----	30
Stramback v. Fidelity Mut. Life Ins. Co.-----	30
Tibbits v. Mut. Ben. Life Ins. Co.-----	28
Thomas v. Northwestern Mut. Life Ins. Co.---	25
Trust Co. v. Ins. Co.-----	30
Thompson v. Fidelity Mut. Life Ins. Co.-----	32
Tigg v. Register Life & Annuity Co. of Iowa--	26

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, <i>Plaintiff in Error,</i>	} No. 1915
VS.	
ADA T. STEWART, <i>Defendant in Error.</i>	

IN ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *District Judge.*

Brief for Plaintiff in Error

STATEMENT OF THE CASE.

This cause comes here on Writ of Error to review the action of the District Court for the Western District of Washington, Southern Division, in entering judgment against the Plaintiff in Error and in favor of the Defendant in Error.

The suit was brought by the Defendant in Error against the Prudential Insurance Company of

2 *Prudential Insurance Co. of America vs.*

America to recover on a \$5,000 policy issued by the company on her husband's life.

On January 26th, 1915, one Ernest C. Stewart, then the husband of Defendant in Error, made written application to the Prudential Insurance Company of America for insurance on his life for the sum of \$5,000.

On February 2nd of the same year he signed a medical examination, and immediately thereafter both the application and the medical examination were forwarded to the Home Office of the company at Newark, New Jersey, arriving there February 13th.

On February 19th the application was accepted and the policy of insurance was dated and issued.

On or about February 26th the policy was received at the company's Tacoma office, and on that day was tendered to the insured. After examining the same, noting the due dates of the premiums, and otherwise discussing the terms of the policy with the agent, he expressed his satisfaction therewith and requested the agent to hold the policy as he did not have the money to pay the first premium on that day but would later call at the office, pay the premium and take up the policy.

The insured's request was complied with, and the policy was held at the Tacoma office until April 15th when he called, paid the first premium and received the policy. When the policy was delivered to him, the company's superintendent specifically directed the insured's attention to May 19th as the due date of the next premium; in response to which he stated that he understood that and would be able to take care of it at that time. A few days before the 19th of June, the last day of grace for paying the second premium, the Tacoma office mailed to the insured a notice of the expiration of the time in which to pay that premium.

The second premium maturing on May 19th was not paid then, nor at any time prior to the insured's death which occurred on July 19th.

The provision in the policy for the payment of premiums is as follows:

“——Twelve and 70/100——Dollars, payable on the delivery of this Policy and thereafter quarter-annually at the Home Office of the Company, or as provided under the head ‘Provisions’ on the second page hereof, in exchange for the Company's receipt on or before the nineteenth day of February, May, August and November, in every year during the continuance of this Policy, until ten full years' premiums shall have been paid, or until the prior death of the Insured.”

In the application which is made a part of the policy appears the following provision:

“I HEREBY DECLARE that all the statements and answers to the above questions are complete and true, and I agree that the foregoing together with this declaration, as well as the statements and answers made or to be made to the Company’s Medical Examiner, shall constitute the application and become a part of the contract of insurance hereby applied for, and it is further agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in full, while my health, habits and occupation are the same as described in this application.”

By reason of the nonpayment of the second quarterly premium the policy lapsed and became void on June 19th, 1915. The insured died just one month from this date.

The Defendant in Error bases her case entirely on the theory that since the policy did not “take effect” until it was delivered and the first premium paid, the payment of that first premium insured her husband for three months from that date and for thirty days grace in addition thereto. In other words, it is claimed, that he was insured from April 15th to August 15th. She further contends the wording of the policy justifies the construction that all subsequent premiums were payable quarter annually from the actual payment of the first prem-

ium and the delivery of the policy. And that, according to that construction, the second premium was due on July 15th and not on May 15th as specified in the policy itself.

The Company rests its case entirely upon the contract as plainly expressed in the policy and application, and maintains that the construction of the policy, according to the ordinary and usual meaning of the language used, entirely precludes the possibility of the claim of the Defendant in Error.

The Complaint of the Defendant in Error is founded upon the policy as issued and delivered. To her Complaint, the Company interposed a Demurrer on the ground that the Complaint did not state facts sufficient to constitute any claim or cause of action against the Company. The Demurrer was overruled, and exception taken and allowed, an Answer was then filed by the Company, and the case afterwards duly came on for trial before the court and a jury. At the commencement of the trial and before the reception of any evidence, Plaintiff in Error moved the court for judgment on the pleadings, which motion being overruled, with an exception duly allowed, Plaintiff in Error thereupon objected to the reception of any evidence for the reason that the Complaint did

not state facts sufficient to constitute any cause of action against the Company, which Motion, with an exception duly allowed, was also overruled. (Tr. 19.)

Thereupon, Defendant in Error offered in evidence the policy of insurance and application and proof of death, and rested. Whereupon Plaintiff in Error moved the court for an instructed verdict in its favor and against the Defendant in Error for the reason that the facts shown by the evidence did not establish any cause of action against the company, which Motion was overruled and exception duly allowed. (Tr. 20.)

Plaintiff in Error called as a witness in its behalf the soliciting agent who procured the application for the insurance, who testified, in substance, that on the day the policy was received at the Tacoma office, February 26th, he called on the insured and tendered him the policy, which the insured could not take because he did not have the money to pay the first premium. While there, he explained to the insured the various provisions of the policy and particularly called his attention to the due dates of the premiums as specified on the first page of the policy. He requested the agent to keep the policy until he would receive some money that he was expecting, when he would call at the office and take up the policy. (Tr. 22.)

The Company's superintendent at Tacoma also testified as a witness, and stated, in substance, that the insured called at his office on April 15th, paid the first premium and received the policy; that before accepting the money, witness directed the insured's attention to the fact that the second premium was due in one month and asked him if he did not want to include that with the first premium. The insured replied that he would pay the first premium and would take care of the second premium in the course of a month. (Tr. 23.)

A clerk at the Tacoma office also appeared and testified, in substance, that she sent to insured, as alleged in paragraph XII of Plaintiff's Complaint, notice of the maturing date of the second premium, and requesting him to call and pay the same. (Tr. 26.)

At the conclusion of all the testimony, Plaintiff in Error renewed its motion for an instructed verdict in its favor and against Defendant in Error for the reason that it appeared from the pleadings and the evidence that the Company was in no manner liable to the Defendant in Error, which motion was by the court denied and exception allowed. (Tr. 28.)

Thereupon, the Defendant in Error moved the court for a directed verdict in her favor, and be-

fore the same was acted upon by the court, Plaintiff in Error objected to the motion on the ground and for the reason that there were facts established by the evidence which must be passed upon by the jury, in any event, before a verdict could be entered in her favor. Which objection was overruled and the motion of Defendant in Error was granted in words as follows:

“The Plaintiff’s motion for an instructed verdict will be granted. Gentlemen of the jury, this policy, to read this whole provision, ‘premium, \$12.70, payable on the delivery of this policy, and thereafter quarter-annually at the home office of the Company, or as provided under the heading “Provisions” on the second page hereof, in exchange for the Company’s receipt on or before the 19th day of February, May, August and November in every year during the continuance of this policy until ten full years’ premiums shall have been paid or the prior death of the insured.’ Now, if we had nothing to go by but by that language, some doubt might be admitted as to whether ‘quarter-annually’ referred to after the date of the delivery of the policy and the payment of the first premium, or whether it referred to quarter dates afterwards, that is the 19th day of February, May, August and November after payment, but, when you pause to consider the purpose of the transaction, that is that that first \$12.70 paid for something, if that was a quarter’s insurance, then it is wholly unreasonable to conclude that the insurance company was taking something for nothing, that it was taking a quarter’s insurance for thirty days’ insurance. I, therefore, grant the plaintiff’s motion, and instruct you to return a verdict in plaintiff’s favor, the policy being for \$5,000.00, and three of

the quarter payments of the premium for that year not having been paid, that will be deducted from the \$5,000.00, leaving, as I understand the calculation of counsel, \$4,961.90, and then interest on that at 6 per cent. from October 29th, 1915.” (Tr. 30.)

To which ruling an exception was taken and duly allowed.

A verdict was signed and returned by the jury in accordance with the instruction, and over the objection of Plaintiff in Error, received and filed. (Tr. 31.)

In due time thereafter, Plaintiff in Error served and filed its Petition for a New Trial, which came on regularly for hearing and was overruled and an exception duly allowed Plaintiff in Error. For the review of all of which, the case is brought to this court on Writ of Error.

SPECIFICATIONS OF ERROR RELIED UPON.

Plaintiff in Error contends that the lower court erred in the following particulars:

1. In overruling the Demurrer to the Complaint.
2. In denying the Company's Motion for Judgment on the pleadings.
3. In denying the Company's objection to the

introduction of any testimony on the ground and for the reason that the Complaint did not state facts sufficient to constitute a cause of action.

4. In denying the Company's Motion, at the conclusion of all the evidence offered by the Defendant in Error, for a directed verdict in its favor.

5. In denying the Motion of the Company, at the conclusion of all the testimony offered on the trial, for a directed verdict in its favor and against the Defendant in Error.

6. In granting the Motion of the Defendant in Error, at the close of all the testimony, for a directed verdict in her favor and against the Company.

7. In receiving and recording the verdict of the jury.

8. In signing, entering and docketing the judgment in favor of the Defendant in Error and against the company.

9. In the abuse of its discretion in denying the Company's Petition for a new trial.

POINTS AND AUTHORITIES.

The contract of insurance, involved in this case, is plain and unambiguous. It is susceptible of no construction, other than the meaning conveyed by the simple and direct language employed.

So self-evident are its provisions that no additional word or thought can add to their lucidity. It contains no equivocations nor uncertainties to be unravelled by legal or technical knowledge. Any one able to read and comprehend, can readily read and understand this contract. Therefore, we realize the futility of undertaking any explanation. The contract is self-explanatory.

In view of this situation, we feel the burden is entirely on the Defendant in Error. It remains for her to establish her theory as a substitute for the contract so plainly expressed in the policy. So in presenting our opening brief, we must anticipate the position and argument of Defendant in Error.

Each of the foregoing specifications of error is grounded upon the lower court's construction of the insurance contract. The argument which follows, is directed against each of the alleged errors. And for these reasons, and for the convenience of this Court, the errors are not discussed separately.

THEORY OF DEFENDANT IN ERROR.—

The construction, which Defendant in Error seeks to place on the contract, is indicated by her Complaint, paragraph VII, in words as follows:

“That among the provisions therein contained, was the following:

“Premium—Twelve and 70/100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home Office of the Company,’

following this with an alternative provision of paying quarterly on certain dates mentioned, to local agents in Tacoma, providing such agents had official receipts signed by the president or secretary, and countersigned by an authorized agent of the Company.” (Tr. 3.)

The entire provision, in the policy, relative to the payment of premiums, from which the above is taken, is as follows:

“Twelve and 70/100 Dollars, payable on the delivery of this Policy and thereafter quarter-annually at the Home Office of the Company, or as provided under the heading ‘Provisions’ on the second page hereof, in exchange for the Company’s receipt on or before the nineteenth day of February, May, August and November in every year during the continuance of this Policy, until ten full years’ premiums shall have been paid, or until the prior death of the Insured.” (Tr. 38.)

The phrase, “or as provided under heading ‘Provisions’ on second page hereof,” of course, refers to and modifies the preceding statement as to *where* the premiums are payable. This quoted phrase and the preceding one, in direct and simple words, expresses the amount of the premiums and *where* they are to be paid. The remainder of the sentence states *when* the premiums are to be paid. No modifying word or phrase appears following the dates to render them uncertain or indefinite.

The entire sentence is perfect, grammatically. The phrase quoted, may be placed, between commas, after the word "year," or after the word "insured." But if it were so placed, the sentence would not be so plain and direct, because the quoted phrase would be too remote from that part of the sentence it was intended to modify. All that is found under the heading "Provisions" on second page of the policy, relative to the payment of premiums, is contained in the first paragraph thereof and reads:

"Payment of Premiums.—This Policy is based upon the payment of premiums annually in advance, but if premiums be made payable in quarterly or semi-annual instalments, any future instalments of the premium for the current policy year remaining unpaid at the maturity of the Policy shall be considered an indebtedness to the Company on account of this Policy. *Premiums are payable at the Home Office of the Company, but may be paid to an agent of the Company on or before the dates when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company.* If any premium be not paid when due this Policy shall be void and all premiums forfeited to the Company, except as herein provided."

And therein is found the *additional place* where the premiums may be paid, referred to by the phrase: "Or as provided under the heading 'Provisions' on the second page hereof." Thus the *time* and *place* for the payment of the premiums are definitely stated. To adopt the construction plead-

ed in the Complaint—as just quoted—would garble and distort the contract.

Defendant in Error next advances the theory that since the policy was not delivered to the insured until April 15, the second quarterly premium was not due until July 15, which, with the 30 days' grace, carried the insurance up to August 15. This theory was adopted by the trial court. It would seem to be an arbitrary conclusion not only not warranted by, but clearly in contradiction of, the positive terms of the contract. From the provisions of the policy, last quoted, appears the following: "This policy is based upon the payment of premiums *annually in advance* * * *" then continues with the provision that the whole year's premium is due although the insured may be permitted to pay quarterly or semi-annually. It is not provided in this connection, nor elsewhere in the contract, that \$12.70, the quarterly payment, carried the policy for three months or any period, but the insured did agree to pay the *annual premium* and further agreed to pay \$12.70 of it quarterly on February 19, May 19, August 19 and November 19. In the *application no dates* were agreed upon for the payment of the premiums. But it was agreed therein: "And it is further agreed that the policy herein applied for shall be accepted

subject to the privileges and *provisions* therein contained." (Tr. 36.) The policy fixes the dates for the payment of the premiums. When it was tendered to the insured, immediately after its issue, and again when he received and accepted the policy, his attention was directed to the provisions of the policy including the due dates of the premiums. Hence, he was fully cognizant of the maturity of the premiums as fixed by the contract. (Tr. 22-3.) And the insured further agreed: "If any premium be not paid when due, this policy *shall be void* and all premiums forfeited to the company, except as herein provided." (Tr. 42.)

In view of these undisputed facts, and the absence of fraud or unfair dealing, it would seem the beneficiary, Defendant in Error, is estopped from questioning the due dates of the premiums as expressed in the policy.

New York Life Ins. Co. v. Fletcher, 117 U. S. 519.

Mutual Life Ins. Co. v. Kelly, 52 C. C. A. 154.

In *Home Ins. Co. v. Myers*, 50 C. C. A. 544, there was in dispute the date from which the insurance became effective, and the Court observed:

"But the contract of insurance usually expressed by a policy was clearly not to be made until the application should be approved by the Company, and then, in the absence of stipulation to the con-

trary, only within a reasonable time thereafter. But, suppose it to be true that the application contemplated that the insurance applied for, if approved by the company, should be effective after July 1, 1892. The company executed its policies bearing date September 8, 1892, reciting in each of them that they were issued in consideration of the 'application for this policy,' and tendered the same to the insured as and for the insurance applied for, and he accepted the same as issued on that application. Such being the case, we are of opinion that the contracts of insurance were accepted by the insured in full satisfaction of the contract for insurance, and that any trifling departures from the provisions of the latter contract were thereby waived by him. The plaintiff, claiming under and through him, is bound by his acts, and on every principle of estoppel cannot repudiate his obligations, constituting the admitted consideration for the policy, and hold the insurer to honor its obligation undertaken for that consideration. The doctrine of waiver and estoppel both combine to prevent any such inequitable result."

In reply to this, we assume her Counsel will fall back on the rule that insurance contracts must be construed against the insurance companies. The statement of Judge Sanborn in *Standard Life & Accident Co. v. McNulty*, 85 C. C. A., 22, is quite applicable to the theory urged in this case by Defendant in Error:

"Counsel for the plaintiff invoke the familiar rule that a policy of insurance should be construed favorably to the insured in cases of doubt or ambiguity. But this rule ought not to be permitted to have the effect to make a plain agreement ambiguous, and then to interpret it in favor of the in-

sured. 'Contracts of insurance like other contracts are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.' "

"The natural obvious meaning of the provisions of a contract should be preferred to any curious hidden sense which nothing but the exigencies of a hard case and the ingenuity of a trained and acute intellect would discover."

Conditions that evoked this rule, no longer exist. Then insurance policies were, in effect, unilateral contracts; the terms were entirely dictated by the companies; all profits of the business went to the companies, and the State exerted no supervisory control over them. Now the policyholder participates in the profits, and the State derives a revenue from the premiums paid. The State dictates the essential features which must appear in every policy (R. & B. Code 6155); it, very properly, asserts the right to examine into the condition and management of the companies (R. & B. Code 6146); no form of policy can be used until approved by the Commissioner of Insurance (R. & B. Code 6155), and in many other particulars, the insured is safeguarded by statute. In view of this supervision by the State, there seems no justice in the application of the rule that the contract, when thus made, must be construed against the company.

WHEN DID THE CONTRACT BEGIN AND WHEN WERE THE PREMIUMS DUE? This question is presented by the theory on which Defendant in Error strives to sustain her action. Answer is found in the clear terms of the policy. It is contended that the date of the execution of the policy and times, stated therein, for the payment of the premiums, do not control because of the provision in the application that the policy was not to take effect until delivered and the first premium paid. *Unless something was stated to the contrary, the contract would not be consummated until the risk was accepted, the policy executed and delivered.*

“The general rule is well settled that the policy takes effect from its date, unless it be otherwise stated that it shall only take effect upon certain conditions. It is also held that upon such conditions being met, if the policy is delivered, it takes effect as of the day of its date. May on Insurance, Sec. 400.”

Rayburn v. Pennsylvania Casualty Co., 138 N. C. 379.

So in this case, when the insured paid the first premium and accepted the policy, it took effect as of the day of its execution and date.

“Another rule of interpretation applicable here, is, that when there is a conflict between the provisions of the policy and the statements contained in the application the former controls.”

Goodwin v. Provident Sav. Life Assur. Soc.
(Ia.), 66 N. W. 157.

It is manifest from the context of the entire policy that both parties fixed the date thereof as the beginning of the contract. On the first page, the term of insurance is 10 years "from the date of this policy," at bottom of the page is found this significant provision: "Premiums payable for ten years. *Policy void TEN YEARS AFTER DATE*," on the second page, a provision is found for converting the policy into another form within 7 years "from the date of this policy;" the suicide clause limits the Company's liability for 1 year from its date; and the incontestability clause likewise begins one year from date; and all other conditions and privileges are calculated from the date of the policy. Had the insured survived, and kept his premiums paid up, until April 14, 1916, and then died by his own hand, of course, the beneficiary would then insist that the insurance had been in force and effect since the date of the policy and would strenuously resist the very construction which *her* action is now based on. Or, had the insured survived until April 14, 1916, with his premiums all paid, and then died, for the same reason the beneficiary would resist the right of the company to contest her claim for the insurance, on the ground, that the policy had been in force since its date. Therefore the date of the

policy is the only date, for the beginning of the contract, that harmonizes with all the provisions of the policy and with the evident intention of the parties thereto. Furthermore, the insured himself so interpreted the policy. (Tr. 22, 23.)

Anderson v. Mut. Life Ins. Co., 164 Calif. 712.

The statute requires the contract of insurance to be in writing. And requires each policy to be signed by certain executive officers of the company. Also requires a medical examination. Section 6155 R. & B. Code. It must be written so its terms may be definite and certain, and not dependent upon the uncertainty of parol evidence. The policy's most vital elements are the date, the amount of the premiums, and when and where payable. Since the statute requires a medical examination and the signing of the policies by certain officers, the legislature, of course, assumed that some time must intervene between the date of the application and the signing of the policy with all its terms and conditions stated. Especially so where the insured and insurer are on opposite sides of the continent. It must also be remembered that the delay in paying the first premium was entirely the fault of the insured. The only uncertainty complained of in the contract, by his beneficiary, was occasioned entirely by him.

The insured was a school teacher, hence a man of at least ordinary intelligence. Then, it is difficult to imagine how he could have read the policy and been in any doubt as to the date of the commencement of his insurance or the dates for the payment of the premiums. As stated by Justice Peckham in *Nederland Life Insurance Co. v. Meinert*, 199 U. S. 171, "Courts can not proceed upon the theory that policy holders are *non com-potes mentis*."

The lower Court erroneously assumed that the \$12.70, received on the delivery of the policy, paid for three months' insurance from that date. This assumption became the false major premise of the Court's decision. In so assuming, the Court ignored the positive stipulation, in the policy, that the insurance policy was based on the payment, *in full, of the first year's premium*. This provision was not overlooked, because, in the judgment rendered, the Court deducted the three unpaid quarter-annual premiums. Hence, the lower Court recognized, as it must be conceded, that so soon as the policy was delivered, the assured became liable to the company for the entire annual premium. He agreed to pay it in four equal parts, one-fourth on the delivery of the policy, the other three-fourths on the dates named in the policy. It was provided in the policy,

that if any installment be not paid when due, the policy became void. Both parties mutually agreed in this policy when the subsequent installments were to be paid, and also agreed upon the penalty that must follow the failure to promptly make the payments.

The lower Court, also, erroneously assumed that the assured placed the same construction upon the contract, namely, that when he paid the \$12.70, he was insured for four months from the date of the payment. It is shown by the uncontradicted testimony of Mr. Yantis and Mr. Dole that the assured, when the policy was tendered to him, and afterwards, when he finally accepted it, knew the premiums were payable in February, May, August, and November, and testified positively that he knew, at the time he made the payment that his next payment would be due in May. In view of this testimony, the Court is not justified in speculating as to the assured's understanding of this particular part of the contract.

AUTHORITIES CITED—So much depends on the peculiar circumstances in individual cases of this character, that decisions in other cases are not, as a rule, very helpful. However, there are a number of cases involving substantially the same question to be found in the State and Federal reports.

For instance, *M'Connell vs. Provident Savings Life Assur. Soc.*, 92 Fed. 769; 34 C. C. A. 663, decided exactly the same issue raised in the case at bar. M'Connell made application for insurance on April 27, signed and dated the application April 29. It was forwarded to the Company, accepted, and a policy issued thereon dated April 27. The premiums were payable quarterly, April 27, July 27, October 27 and January 27. The insured died on the day his second quarterly premium matured, July 27. The second quarter annual premium was not paid. The policy contained the following provision: "This policy does not go into effect until the first premium has been actually paid during the life and good health of the within named insured." The Court, through Judge Taft, states the question presented thus:

"It is argued that, because there was no insurance upon the life of M'Connell until the 9th or 10th of May, when the policy was delivered to him, he was made to pay \$20 for two months' insurance, instead of three months, in accordance with the contract, and that the dating back of the policy was merely nugatory and illusory, for it could have no effect by relation."

The Court decided:

"Now, it is quite true that the applicant, upon examining his policy, and finding it dated the 27th day of April, when he did not receive it until the 9th day of May, might have objected to the date, and might have requested that the dates

be changed. In such a case the company could either have declined the insurance, or acquiesced in the suggestion. But until the policy was delivered, and the money paid, the contract of insurance was not entered into by the parties. We can only gather the intention of the parties from the face of the contract itself and the surrounding circumstances. The slightest examination of the policy by the insured would have shown him that the quarterly payments fell due on quarters calculated from the 27th of April. If he did not consent to this, he should then have objected. He made no objection. The evidence shows that he received notice that his premium was due on the 27th of July. Indeed, it shows that two notices were sent, and that he certainly received one. No objection was made on his part to the date at that time."

Methvin v. Fidelity Mut. Life Ass'n., (Cal.) 61 Pac. 1112, is another case wherein the same question was under consideration. The Court holding in that case the date of the policy was the date adopted by both parties to the contract. In that case the premiums were also payable quarterly. "On the trial it was conceded that the second payment was not made, but it was contended that the payment of the first premium ran three months from the 3d day of September, instead of from July 30, as plainly declared both in the policy and the receipt for the first payment delivered with it." In that case the policy was issued and dated July 30th. The quarter annual premiums were due July 30 and every three months thereafter. It was also pro-

vided in the policy that it should not go into effect until it was delivered and the first premium paid. It was not delivered until September 3rd. The lower Court held that the contract went into effect on September 3rd and the payment of the first quarterly premium carried the insurance from that date.

The Supreme Court in reversing the lower court decided:

“The policy was executed, as appears on its face, July 30, 1895. Necessarily some little time must elapse between its execution in Philadelphia and delivery in Los Angeles, which both parties to the contract, of course, well understood; and, without the provision contained in the policy, that it would not be binding until delivered, the same result would have followed. ‘A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent.’ Civ. Code No. 1626. If it were not delivered until September 3d, the date when the receipt was countersigned by the local agent, that would not alter the case. The payments are expressly specified in the policy to be due and payable on or before the 30th day of July, October, January, and April every day. The first payment, under the terms of the policy, ran from the 30th of July to the 30th of October.

The court might as well undertake to release the insured from the payment of premiums altogether, as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations.”

See also: *Thomas v. Northwestern Mut. Life Ins. Co.*, (Cal.) 75 Pac. 665.

In *Jewett v. Northwestern Nat. Life Ins. Co.*, (Mich.) 112 N. W. 734, the Supreme Court of Michigan passed upon the same question. The policy had a similar provision to the effect that it would not go into effect until the first premium was paid and the beneficiary insisted upon the benefit of the time intervening between the actual signing and execution of the policy and the date of its actual delivery. In disposing of this proposition the court observed:

“There is always a time between the application for a policy and its issuance by the company, where it is expressly so provided, that liability does not attach. That fact, however, does not operate to change the times and terms of payment expressly provided in the policy itself. The contention of the learned counsel is that, inasmuch as the policy in question was not in force until the 18th day of August, therefore the payments of the quarterly premiums were postponed 18 days. It would follow also that, had Mr. Jewett lived 10 years, the policy would not have become due until the 18th day of August, 1912, instead of August 1st, as expressly provided in the contract. To so hold would not be the interpretation of ambiguous language, but would result in a court-made contract.”

The Iowa Supreme Court in *Tigg v. Register Life & Annuity Ins. Co.* of Iowa, 133 N. W. 322, likewise decided, on facts practically the same as those in the case at bar, that the premiums must be paid as specified in the policy. And speaking of the interval between the execution and date of

the policy and the date of its actual delivery, the Court observed:

“The policy was issued in consideration of the present payment of the premium ‘and of the annual premium * * * to be paid * * * at or before 12 o’clock M., on the 7th day of August in every year during the life of the assured.’ Even though this fixed the date of the second payment less than a year after the issuance of the policy, it definitely determined the dates at which all premiums were payable, and the 30 days grace would not extend the time within which payment might be made beyond September 7, 1908. Fraud is not charged, as was done in *McMaster v. New York Life Ins. Co.*, 183 U. S. 25.”

The Supreme Court of the State of Illinois in *Rose v. Mut. Life Ins. Co.*, 88 N. E. 204, on a similar state of facts, held that the premiums must be paid as specified on the face of the policy, although the policy provided that it did not go into effect until the first premium was paid.

Subsequently, the Appellate Court of that State in *Forch, et al, v. Western Life Indemnity Co.*, 157 Ill. App. 244, in construing a policy executed June 3rd and delivered June 6th, the assured contended that since the policy did not go into effect until its delivery the insurance company was liable, the Court held that as the policy provided that the annual premium should be paid on or before the 3d of June in every year during the continuance of the contract, in the absence of fraud, misrepresenta-

tion, mistake or accident which were not alleged, both parties were bound by its terms and that the policy became void for the nonpayment of the second annual premium on the due date June 3d, 1908.

The Supreme Court of Indiana was called upon to construe a policy of life insurance under practically the same conditions as those involved here, in the case of *Tibbits v. Mut. Ben. Life Ins. Co.*, 65 N. E. 1033. The premiums were payable quarterly. The policy was dated April 25th but was not delivered until April 30 and as the policy provided that it was not to go into effect until delivery, it was contended by the beneficiary that the term of insurance did not begin until that date and that the subsequent quarterly payments must be fixed from that date, also. The Court held:

“The payment of the premium at the very time fixed by the policy was a condition precedent on which the liability of the appellee was expressly declared to depend. * * * Any other day in the month, before or after July 25th, might have been named by them, or the premium for the whole year might have been made payable on a day named in the policy. Both parties would have been bound by such an agreement.”

The United States Supreme Court in *McMaster v. N. Y. Life Ins. Co.*, 183 U. S. 25, construed a contract providing that the policy should not be in force until the actual payment of the premium. The policy was executed and dated December 18th. It

was delivered and the first premium paid December 26th. The application was dated December 12th, and this clause inserted therein, by the agent after the application was signed and delivered and without the knowledge or consent of the insured: "Please date policy same as application." The policy was not so dated but it provided for the payment of premiums on December 12th of each year. The question presented was: when did the insurance go into effect, December 12th, 18th, or 26? The question was answered by the court as follows:

"But the policies were not dated December 12, and were dated December 18, the day on which they were actually issued. The applications were in terms, parts of the policies, and by them it was agreed that the policies, though issued, should not be in force until the actual payment and acceptance of the premiums. This was a provision intended to cover any time which might elapse between issue and delivery and payment. So that, notwithstanding the premiums in this instance were not actually paid and received and the policies delivered until December 26, it may be conceded that, and in accordance with the practice in such matters, the contracts of insurance commenced to run from December 18 rather than from December 26. They were certainly not in force on December 12, 1893."

And finally the court decided:

"The truth is the policies were not in force until December 18, and as the premiums were to be paid annually, and were so paid in advance on delivery, the second payments were not demandable on December 12, 1894, as a condition of the continuance of the policies from the 12th to the 18th. And as

the policies could not be forfeited for nonpayment during that time the month of grace could not be shortened by deducting the six days which belonged to McMaster of right."

Furthermore, in that case, the court held that the insured was not bound by the provision making the premiums payable December 12th, nor was he or his beneficiary estopped from assailing this condition of the contract by receiving and accepting the policy, *because the provision was inserted without the insured's knowledge and through the fraud and deception of the Company's agent.* This part of the decision, therefore, has no application to the case at bar.

"Premiums are payable on the dates fixed by the contract, and the fact that the policy does not go into effect on a date corresponding to the date fixed for payment of subsequent premiums does not change the provisions of the contract as to when such subsequent premiums become payable."

25 Cyc. 751;

Trust Co. v. Ins. Co., 53 Pa. Super 425;

Ins. Co. v. McKay, 6 Ga. App. 285;

Pense v. Assurance Co., 14 Ont. L. R. 613;

Bryan v. Nat. Life Ins. Co., 21 R. I. 149.

We assume the Defendant in Error will cite the following cases:

Stinchcombe v. N. Y. Life Ins. Co., (Ore.)
80 Pac. 213;

Stramback v. Fidelity Mut. Life Ins. Co.,
(Minn.) 102 N. W. 731;

Halsey v. Amer. Central Life Ins. Co., (Mo.)
167 S. W. 591;

McMaster v. N. Y. Life Ins. Co., 183 U. S. 25.

In the Stinchcombe case the application was made May 5, policy issued July 10, and the policy delivered and first premium paid July 24. The policy expressly stated that the \$70.40 paid for "two years' term insurance." A very distinguishing feature from the case at bar where the contract states: "*This policy is based upon payment of premiums annually in advance.*" But, in fact, only one-fourth of the premium was paid on the delivery of the policy, at which time the full year's premium was due. And for that reason the parties to the contract could well have agreed to pay the other three-fourths in 10, 20 or 30 days, or on any other date or dates agreeable to them, and likewise could agree that the failure to pay any one of the installments when due, would render the policy void. And the Court would not be justified in segregating the payments, computing the time and arbitrarily stating that the portion of the annual premium paid covered a certain period.

"Primarily, the whole of the annual premium was payable in advance. The consideration for the policy was the payment of the whole premium; if not paid, the policy to lapse. But the option was given the insured to pay thrice yearly in advance. In the first case, there was no obligation to pay the sum insured unless the thrice yearly payments were made when due."

Thompson v. Fidelity Mut. Life Ins. Co.,
116 Tenn. 557.

Under the rule announced by the United States Supreme Court in the *McMaster* case, the applicant, in this *Stinchcombe* case, was insured from the date of the policy, July 10, 1904, up to July 10, 1906. He died July 3, 1906, so the policy had seven days to run, not including the 30 days grace. Other features in that case clearly distinguish it from the case at bar, so that, in no event, does it sustain the contention of the Defendant in Error in this case.

In the *Stramback* case, the Court, in the majority opinion, is frank in declaring its attitude towards insurance companies. At the threshold of the opinion it is stated: "The rule of construction to be applied here is that the instrument shall be construed strictly against the insurer." The United States Supreme Court, in like circumstances, in *Imperial Fire Ins. Co. v. County of Coos*, 151 U. S. 452, defined the attitude that should be assumed by the courts in construing contracts of insurance.

"But the rule is equally well settled that contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary and popular sense.

"If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

In the Stramback case the Court justified its decision on this provision of the policy:

"The premiums hereon may be paid annually, semi-annually or quarterly, in advance, in accordance with the company's table of rates applicable hereto, *but in any event this policy shall continue in force only for the period actually paid.*"

which indicates, as the Court holds, that it was the intent of the Company that each semi-annual premium paid for six months insurance. No such inference can be drawn from the contract in this case. Neither did the applicant in that case agree that the policy "would be accepted subject to the privileges and provisions therein contained." The criticism of Judge Brown in his dissenting opinion seems justified.

The Halsey case substantially follows the Minnesota case. Other decisions, of like import, are found in the Missouri Reports. In that case the

\$307, hereby insures the life of Augustus C. Halsey policy declared: "In consideration of * * * * * for the period of one year from the 24th day of May, 1906." The Court held that he was not insured for that period, but from June 5, (date of payment of premium and receipt of policy) to June 5, 1907, the day on which the insured died. This seems to be an instance, referred to by the Supreme Court, where the court undertook to make the contract for the parties.

It is worthy of note that in the Stinchcombe, Stramback and Halsey cases, the Court, in each instance, cites the McMaster case as authority for the opinion. The misinterpretation of the decision in the McMaster case is largely responsible for the decision rendered in each of said cases. For a minute and thorough analysis of the decision in the McMaster case, attention is directed to the opinion of Chief Justice Cartwright in *Rose v. Mut. Life Ins. Co.*, 240 Ill. 45. In the course of a long review of the decision, we find:

"That was a case of fraud on the insured, and the question was whether he was estopped to prove the facts or barred by negligence in failing to read the policies. The decision does not tend to support the argument that the premium in this case was not due according to the terms of the policy, there being no claim of fraud, misrepresentation, mistake, or accident. The policy provided that the

annual premium should be paid on the 23rd day of May in every year during the continuance of the contract, and, in the absence of fraud or mistake, both parties were bound by its terms. *Tibbitts v. Mutual Benefit Life Ins. Co.*, 159 Ind. 671, 65 N. E. 1033."

Judge Hook, in *Johnson v. Mutual Benefit Life Ins. Co.*, 75 C. C. A. 22, in refusing to apply the *McMaster* case, as desired by the Defendant in Error in the case at bar, said:

"The case of *McMaster v. Insurance Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64, upon which counsel rely, is not in point. There the request that the policies when issued be antedated was inserted in the application by the agent of the company for his own private purpose without the knowledge or consent of the insured, and after his signature had been obtained to the application. The policies subsequently issued provided that the due date of future premiums should correspond with the earlier date of the application, but this was neither desired nor authorized by the insured nor was he cognizant of it. On the contrary, when the policies were delivered to the insured untrue representations were made to him as to their purport in this particular."

When Defendant in Error moved for a directed verdict, she, of course, admitted, as the evidence established, that the policy, immediately on its receipt, was exhibited to the insured, its terms explained, including place and time for paying the premiums, and again explained when he finally received the policy, and that it was entirely satisfactory to him. We insist there is no inconsistency what-

ever between the terms of the application and the policy; but, if there had been, it was waived by thus voluntarily approving and accepting the policy. And his beneficiary is estopped from repudiating the contract so made and accepted.

Home v. Myers, 50 C. C. A. 544.

The interest of all policy holders depends entirely upon the contracts of insurance being strictly complied with. If any legal or unjust claim is paid, they must contribute towards that payment. Under the Washington statute (Sub. 5, Sec. 6155, R. & B. Code) and in practically every State in the Union, policy holders participate, directly or indirectly, in the profits of the company. So it is to the interest of every policy holder that no void or forfeited policy be paid. And as the representative of the policy holders, the company is forced to reject all such claims. (R. & B. Code, 6156.) It is neither right nor just for the Court to penalize those, who strictly comply with their contracts, by forcing them to contribute to the one who, through negligence or otherwise, forfeits his contract.

“A life insurance policy usually stipulates: first, for the payment of premiums; second, for their payment on a day certain; and, third, for the forfeiture of the policy in default of punctual payment. Such are the provisions of the policy which is the basis of this suit.

“Each of these provisions stands on precisely the same footing. If the payment of the premiums, and their payment on the day they fall due, are of the essence of the contract, so is the stipulation for the release of the company from liability in default of punctual payment. No compensation can be made a life insurance company for the general want of punctuality among its patrons.

“Promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments.”

Klein v. N. Y. Life Ins. Co., 104 U. S. 92.

So, in the consideration of this contract, and the evidence, and the law, we believe this Court will be constrained to reverse the lower Court with directions to enter a judgment dismissing this case.

Respectfully submitted,

S. A. KEENAN,

Attorney for Plaintiff in Error.

IN THE
United States Circuit Court
of Appeals

FOR THE NINTH CIRCUIT

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
Corporation,

Plaintiff in Error,

VS.

ADA T. STEWART,

Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *District Judge.*

BRIEF FOR DEFENDANT IN ERROR

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FILED
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BRIEF FOR DEFENDANT IN ERROR

STATEMENT.

This action was brought on a policy of insurance in the sum of Five Thousand Dollars, by the defendant in error.

Application for the policy was made on or about the 2nd day of February, 1915.

The policy was issued on or about the 19th day of February, 1915.

The first premium was paid and the policy was delivered on April 15, 1915. The application contained the following agreement:

“And it is further agreed that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said Company, and the first premium paid thereon in full, while my health, habits and occupation are the same as described in this application.”

The application also provided that the premium was to be paid on the delivery of the policy. The policy contained the following provision:

“PREMIUM—Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company.”

Following this is an alternative clause, giving the assured the privilege of paying the premiums on other dates, to a local agent, providing he had the official premium receipt, signed by the proper officials of the company.

“GRACE IN PAYMENT OF PREMIUM.—In the payment of any premium

under this policy, except the first, a grace of one month, not less than thirty days, without interest, will be allowed during which time the policy will remain in force.”

The company admits, as it admitted in the court below, that the insured was entitled to a month of grace in the payment of the second quarter-annual premium. This is admitted in a letter denying liability, in part as follows:

“You will recall that the first premium was paid on April 15, when the policy was delivered to Mr. Stewart in our Tacoma office by Mr. Dole, the Superintendent in charge. One month before the due-date of the second premium a notice of the premium due May 19th was sent to Mr. Stewart from this office, and ten days before the end of the grace period (which expired June 19, 1915,) Mr. Dole sent a notice to the insured calling special attention to the approaching end of this grace period.”

The insured died on the 19th day of July, 1915.

The defendant in error insists that, under the terms of the policy, the second quarter-annual premium became due one-quarter of a year after the delivery of the policy and the payment of the premium, which was on the 15th day of April, 1915.

That the second quarterly premium became due on the 15th day of July, and the month of grace,

carried the policy until the 15th day of August, or twenty-six days beyond the death of the insured. This is the only question in the case. The facts in reference to it are undisputed, and we base our case here, as in the court below, on a correct construction of the policy and application.

THE FIRST PREMIUM WAS PAID ON THE 15TH DAY OF APRIL. THE NEXT PREMIUM WAS DUE ONE-QUARTER OF A YEAR AFTERWARDS OR ON THE 15TH DAY OF JULY. THE MONTH'S GRACE CARRIED THE POLICY UNTIL AUGUST 15TH.

As already stated, the essential facts in this case are undisputed. The policy was delivered to the insured and the first premium thereon paid on the 15th day of April, 1915. By the terms of the application and the policy, the payment of the first premium, and the delivery of the policy were to be concurrent acts, and the policy should take effect at the moment of the delivery of the policy and the payment of the premium, and not a minute prior thereto. This is the language of the application:

“And it is further agreed, that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained, and said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full, while my health, habits

and occupation are the same as described in this application.”

This language is plain and unambiguous as to the date the policy should go in force. The application also provided for quarter-annual premiums, the first to be paid on the delivery of the policy. The policy provides that the

“PREMIUM.—Twelve and 70-100 Dollars, payable on the delivery of this policy and *thereafter* *quarter*-annually at the home office of the company.”

No note or credit was given on the payment of the first premium, nor was any money paid until the delivery of the policy. So there can be no question as to the day on which the policy took effect, to-wit: on the 15th day of April, 1915.

The courts of last resort are unanimous in holding that, where a policy of insurance specifically provides that it shall not take effect or be in force until the policy is delivered and the premium paid, it becomes operative on the day these two things occur, and not prior thereto. No case can be found, announcing a contrary doctrine. The defendant company is not in a position to make any other claim. The language above quoted is the language of the company. It uses this plain and unambiguous language, clearly, to protect itself in case of the death of the insured or of his becoming in poor health, prior to the delivery of the policy and the

payment of the premium. It has constantly urged and insisted on this interpretation, whenever it has been to its interest so to do.

In a very recent case, this plaintiff in error successfully urged this point of law before the Supreme Court of Michigan, in the case of *Bowen vs. Prudential Insurance Co.*, 144 N. W., 543; the insured had paid the premium concurrent with the signing of the application, and this is successfully maintained in the Supreme Court of that state, on the doctrine we are now contending for. So also in *Giddens vs. Insurance Co.*, 26 Law Ed. 92.

The company, by its literature, table of rates, by its agents and by the policy itself, led the insured to believe that \$12.70 would carry the policy for one full quarter of a year. That the insured would be fully protected for one-quarter of a year after the date the policy was delivered, and the first premium paid, together with one month of grace, as provided by the policy. Nothing could be clearer. Neither party can say that they understood the matter in any other way. The policy says:

“PREMIUM.—Twelve and 70-100 Dollars, payable on the delivery of this policy and *thereafter* quarter-annually at the home office of the company.”

Now, \$12.70, the first premium under this agreement, would pay for and carry the policy for as long as the second quarterly premium, or the third quarterly premium, or any other quarterly

payment. Could any language be plainer or less ambiguous? Is there any room for any other construction than that the first premium was to be paid on the delivery of the policy and the next to be paid *thereafter* quarter-annually? What does the word “thereafter” mean, unless it means that the second quarter-annual premium should be paid a quarter of year after the delivery of the policy? The first was to pay for a quarter of a year, beginning with the policy going into force and effect, and it would carry it for one-quarter of a year, plus the one month of grace provided for. If the second premium was to be paid “quarter-annually” after the date of the delivery of the policy and the payment of the first premium, then it would carry it for one-quarter of a year beyond April 15th, or to July 15th, and the month of grace would carry it in full force and effect until August 15th. The word “thereafter” used in this connection is entirely meaningless, unless given this construction. This meaning and this construction is in exact accordance with what the company led the insured to believe the policy would provide, and exactly what the premium would do—that such a premium would carry the policy for a full quarter of a year.

If the policy were to provide for the payment of a second premium prior to the quarterly date thereafter, or less than three months thereafter, then the company would have been attempting to perpetrate a clear fraud on the insured. It would have been attempting to defraud him out of insur-

ance that he was actually paying for. There can be no doubt that the insured would expect three months' insurance, when he paid just exactly the amount that company was asking for, carrying his life risk for five thousand dollars for three full months.

So here we have a clause that is clear and unambiguous as to the date, the second and other premiums would be due and payable, and it is also in exact accordance with what the insurance company had induced the insured to believe it would do, just exactly what its table of rates said it would do in case it accepted the risk of the insured, and just exactly what the insured understood he was paying his good money for. It is perfectly absurd for the company to claim that it represented to the insured that his first quarter-annual premium would carry the policy for one-twelfth of a year, or just one month and three days. It is equally absurd to suggest that the insured paid his full quarter-annual premium and clearly understood that he was getting only one month and three days' insurance.

All we ask of this court is, to enforce this provision just exactly as it reads. In doing so, it will be doing exactly what is just to the company which wrote the words of the contract. It will be enforcing the contract for just one-quarter of a year and for the full price that the company itself named, and it will be giving to the insured just exactly what he paid his money for, and exactly at the price the company volunteered to do it for. A court never

finds it difficult to enforce a contract, where it can do exact justice to both parties under the terms of a contract which both parties entered into. I would be quite willing to leave this point, without citing an authority in support of our contention. To us it is too clear to need authorities to support it. I have found no decided case where the language of the policy is identical with this, possibly for the reason that no company heretofore has had the temerity to insist on misconstruing its own plain language to secure a forfeiture.

No case that we have found can be said to decide the exact point of this case, for the simple reason, we have found no case where the provisions relative to the date premiums are due, and payable, are similar or anywhere near similar, to the provisions of this policy in reference thereto. In fact, all that we need in this case is a simple reading of the provision and the enforcement of it, as it clearly reads.

But there are a number of cases where a like principle is involved and where the courts sustain our contention. If we apply the reasoning of the court in the case of *McMaster vs. Insurance Company*, 46 Law Ed. 39, 183 U. S. 72, our contention is fully sustained. We quote from the opinion:

“McMaster was justified in assuming, and on the findings must be held to have assumed, that if he paid the first annual premium in full he would be entitled to one year’s protection, and to one month of grace

in addition, that is, to thirteen months' immunity from forfeiture. And the findings show that the company, by its agent, gave that meaning to the clause, and that McMaster was induced to apply for the insurance by reason of the protection he supposed would be thus obtained."

"When, then, McMaster signed these applications he understood, and the company by its agent understood, that if the risks were accepted at the home office he would, by paying one year's premium in full, obtain contracts of insurance which could not be forfeited until after the expiration of thirteen months."

"On the other hand, can the company deny that McMaster obtained insurance which was not forfeitable for non-payment of premiums within thirteen months after the first payment

If it can, by reason of its own act, without McMaster's knowledge, actual or legally imputable, then the company's conduct would have worked a fraud on McMaster in disappointing, without fault on his part, the object for which his money was paid."

"We are dealing purely with the question of forfeiture, and the rule is that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if pos-

sible, which will sustain, rather than forfeit, the contract. *Thompson v. Phenix Ins. Co.*, 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019; *First Nat. Bank v. Hartford F. Ins. Co.*, 95 U. S. 673, 24 L. ed. 563.

“Each of these policies recited that it was made in consideration of the written application therefor, which was made part thereof, and of the payment in advance of an annual premium of \$21, ‘and of the payment of a like sum on the 12th day of December in every year thereafter during the continuance of this policy.’”

“Does this latter provision require payment of an annual premium during the year already secured from forfeiture by payment made in advance?

“May not the words ‘in every year thereafter’ mean in every year after the year the premiums for which have been paid? Or in every year after the current year from the date of the policy?

“At all events, if the payment in advance was a payment which put in force a contract good for life, determinable by non-payment of subsequent premiums, and this first payment was payment of the premiums for a year, could the requirement of payment of a second annual premium within that year be given greater effect than the right to cancel the policies from January 18, 1895, if such

payment were not tendered until after the lapse of thirteen months from December 12, 1893?"

"To hold the insurance forfeitable for non-payment of another premium within the year for which payment had already been fully made would be to contradict the legal effect under the applications and policies of the first annual payment."

"In our opinion the payment of the first year's premiums made the policies non-forfeitable for the period of thirteen months, and, inasmuch as the death of McMaster took place within that period, the alleged forfeiture furnished no defense to the action."

To the same effect is the case of *Stramback vs. Fidelity Mut. Life Ins. Co.*, 102 N. W. 731, decided by the Supreme Court of the State of Minnesota, which approves the doctrine laid down in the *McMaster* case, and uses the following language:

"The rule of construction to be applied here is that the instrument shall be construed strictly against the insurer. It would have been a very easy matter to insert a clause to the effect that the policy should take effect from its date, if such was the intention of the insurer, and, in the absence of any such provision or agreement on the part of the insured, the following provision should control: 'The application, a copy of which is

given on the third page, forms the sole basis of this contract, which is not to be operative or binding until the actual payment of the initial premium and delivery of the policy during the lifetime and good health of the insured.' This language, taken by itself, means not only that the contract became effective upon the date of payment and delivery of the policy, but also that the policy commenced to run from such date. Respondent refers to the following clause in the policy in support of its theory that it was contemplated by the parties that the period of insurance paid for was to begin September 8th, and not at the time of payment and delivery: 'This contract is made in consideration of the written application—and the payment in advance to said company of \$55.02 on the delivery of this policy, and thereafter to the company at its head office in the city of Philadelphia upon the 8th day of the months of September and March in every year until the premiums for fifteen full years shall have been duly paid to said company.' It may be admitted that if this clause were the only provision relative to the subject it might be susceptible of such meaning, but this language must be read in connection with other provisions, viz., the following: 'The premiums hereon may be paid annually, semi-annually or quarterly, in advance, in accord-

ance with the company's table of rates applicable hereto, but in any event this policy shall continue in force only for the period actually paid.' In our judgment, the significant thing is the payment of the premium in advance, and not the date of its payment; and the insured, when furnished with the policy, was entitled to assume that by the payment of the semi-annual premium he had paid for half a year's insurance, and he was advised that all subsequent premiums were required to be paid on the 8th of March and September, but what was there to call his attention to the fact that the period of insurance was to date from the day of such payments? If such is the custom and practice of insurance companies, and the insured had knowledge of it, the record is silent upon that point. The argument is advanced that it would tend to much confusion if insurance policies were required to run from the date of their delivery, instead of the date of their issuance; but, on the other hand, it may be said that the insured could be deprived of insurance already paid for, were the company permitted to conditionally fix the inception of the term of insurance at the date of the policy, dependent upon subsequent payment and delivery. This period between the dating of the policy and its delivery, under such construction, would inure to the benefit

of the company, for it is conceded that if the insured in this case had died between the issuance of the policy, September 8th, and the payment of the premium and delivery of the policy, September 24th, the company would not have been liable. Our conclusion on this point is that it was contemplated by the parties, as gathered from their conduct and the documents, not only that the policy became effective September 24th, but also that the insurance paid for by the initial premium had its inception September 24th.

“Having determined that the insurance period paid for began September 24, 1902, it follows that it would have expired March 24, 1903, had the premium not been paid, but it was paid, and therefore the policy remained in force until forfeiture by non-payment of the next semi-annual installment. The insurance period covered by the first and second premiums expired September 24, 1903, and, the insured having died September 11th, the policy was in force, unless forfeited by a failure to make the payment due September 8th. Whether it was forfeited depends upon the meaning of the language chosen to express the forfeiture, which reads: ‘If any premium be not paid when due, this policy shall be void until duly reinstated during the lifetime and good health of the insured.’ In our judgment, this language was used with

reference to the continuation of the policy after the period already paid for. Forfeitures are not favored in the law, and any other conclusion would work a hardship upon the insured, and should not be upheld unless required by the terms of the contract. It was proper for the insurer to provide that the premium should be paid in advance of the commencement of the period of insurance covered by such payment. As stated in *New York Life Ins. Co. v. Statham*, 92 U. S. 24, 23 L. Ed. 789, contracts of this character are not contracts of assurance for a single year, with the privilege of renewal from year to year by paying the annual premium; but they constitute entire contracts of assurance for life, subject to discontinuance or forfeiture for non-payment of any of the stipulated premiums. This theory is reiterated in *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64. Looking at the contract, therefore, as being one of insurance for life, the most reasonable view is that failure to pay a premium due on a certain date was intended to strike at the contract for the future, and not that part of the contract already executed. This point, we think, is covered by the reasoning in *McMaster v. New York Life Ins. Co.*, *supra*, where application was made and payment fixed on December 12th, and the policy was issued and

dated the 18th, and delivered the 26th, of December. The insured died 13 months after the date of the policy, or the last day of grace; and one of the questions before the court was whether the period of insurance had its inception at the time fixed for payment, December 12th, or at the date of the policy, December 18th. In this respect the court said: 'Notwithstanding the premiums in this instance were not actually paid and received, and the policies delivered, until December 26th, it may be conceded that, and in accordance with the practice of such matters, the contracts of insurance commenced to run from December 18th, rather than from December 26th. They were certainly not in force December 12th.' It will be observed that the court conceded the insured period ran from the date of the policy, rather than from the date of its delivery; but whether it did, or not, was not decided, because the question before the court was whether or not the policy was forfeited upon failure to make the payment on December 12. 'We are dealing purely with questions of forfeiture, and the rule is that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract.' And in discussing the effect of the forfeiture

clause, it was stated: 'To hold the insurance forfeitable for non-payment of another premium within the year for which payment had already been fully made would be to contradict the legal effect, under the applications and policies, of the first annual payment. Clearly, such a construction is uncalled for., if the words 'the 12th day of December in every year thereafter' could be assumed to mean in every year after the year for which the premium had been paid.' The court concludes: 'In our opinion, the payment of the first year' premiums made the policies non-forfeitable for a period of thirteen months, and, inasmuch as the death of Mr. McMaster took place within that period, the alleged forfeiture furnished no defense to the action.' "

To the same effect is the case of *Stinchcombe v. New York Life Ins. Co.*, 80 Pac. 213, decided by the Supreme Court of Oregon, as follows:

"The defendant either insured Stinchcombe from the 5th day of May, or it did not insure him until the 24th day of July, when the policy was delivered and the premium paid and accepted by it. It is certain that it did not make itself liable until the latter date, and are we to suppose that, without engagement to that effect, the company intended to collect the premium and the insured to pay for insurance he did not have? Rather

would the deduction be to the contrary. And such is our interpretation of the contract, that it did not become effective and binding as an insurance upon the life of Stinchcombe until such latter date, either to fix the liability of the company or to require the insured to pay for insurance in the meanwhile. Now, the \$70.40 paid for two years' insurance. It is so expressly stated in the policy as follows: 'Being the premium for two years' term insurance.' This insurance began with the date of July 24, 1894, by the delivery of the policy and the payment and acceptance of the premium, and Stinchcombe's life became insured, not alone for the term of two years, but for the entire term fixed by the policy according to its provisions, but subject to forfeiture for the failure to perform those conditions subsequent as might entail such a result, among which are those relating to the prompt payment of the premiums. *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789. By one of the conditions on the next page, so denominated, a grace of one month is allowed in the payment of the annual premiums, subject to an interest charge, so that on the face of the contract there was accorded the insured 25 months in which to make the second payment of premium, thus extending the time to June 5, 1896. Such premium not having been paid before that

date, a forfeiture was incurred, but when did it become operative? At once upon the default in meeting the payment, or at the end of the time for which the insured had paid for his insurance? It is argued that the forfeiture clause is direct and unmistakable, and indicates an intendment that the policy should become at once void by reason of the non-payment of the premium on the day it was demandable. It does not say so, however, but that it 'shall become void.' The interpretation would deprive the assured of a period of the insurance that he had actually paid for, to-wit, from June 5th to July 24th, so that the forfeiture, in that view, would not only incur the penalty of depriving the assured of his right to continue under the contract, but also of cutting short by a most appreciable term the insurance absolutely obtained by payment of the premium for two years in advance. There is here a palpable incongruity, and, if the company's contention be the correct one as to the proper interpretation of the contract, it is perfectly manifest that it will be fraught with injustice to the beneficiary. It is very well understood, a condition arising from an innate sense of justice, that the law in its policy and spirit is averse to the declaration of forfeitures, and will not entail such consequences as between individuals, but in pursuance of the plain

and obvious intendment of contractual relations. It is also a canon of the construction of contracts, so well settled as to need no citation of authorities to support it, that inconsistent provisions rendering it doubtful or uncertain whether, or under what conditions, a forfeiture was really intended, will be so interpreted, whenever they can, within the bounds of reason and common fairness, as to elude the forfeiture and secure to the parties that to which they are in justice entitled. Beyond this there is another rule that, as between inconsistent, conflicting and incongruous provisions, of doubtful and ambiguous significance, in a policy of insurance, it being manifest that the form and all the necessary conditions are the statements, essentially, of the officers, agents, and attorneys of the company, the construction most favorable to the assured will be adopted and applied. *Fenton v. Fidelity & Casualty Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; *Stringham v. Mutual Life Ins. Co.*, 44 Or. 447, 75 Pac. 822; *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563; *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64. Now, applying these plain and obvious canons of construction and interpretation, it is neither inconsistent with reason nor fair dealing to conclude that the true intendment of the contract, looking

through the whole of it, including the application, the policy, and the provisions on the next page, is that there should be no forfeiture of the insurance paid for—that is, of any part of the ‘two years’ term insurance’—and that the policy was not rendered void, as affecting such term or period, until its time had fully run. This does not take into account the effect of the provision touching the month of grace for making the payment, because not involved here. Such, in effect, is the holding of the Supreme Court of the United States in *McMaster v. New York Life Insurance Company*, *supra*. In reality, this is a much stronger case than that for the beneficiary. It does no injustice to the insurance company having received the stipulated consideration, and it conserves to the injured or his beneficiary that for which he has actually paid his money in the way of premium.”

To the same effect is another case decided by the Supreme Court of Missouri, *Halsey vs. American Central Life Insurance Co.*, 167 S. W. 951, in which the following language is used:

“All the courts of the country, both state and federal, give a very liberal construction to contracts of insurance, and never permit a miscarriage of justice by a technical or narrow construction thereof.

“While this record discloses the fact that

the application for the insurance of the deceased was dated May 24, 1906, and that the premiums were payable upon that date, yet that was not all of the contract between the parties. The policy itself was just as important a factor in the agreement as was application for the insurance. The policy was dated May 31, 1906; but it was not delivered until June 5th of that year, which by its express terms was not to become effective until delivered and the first annual premium paid, which was done on June 5, 1906.

“Under the terms of this contract, which consisted of the application and the policy issued in pursuance thereto, the deceased was clearly insured for one full year from June 5, 1906, to the last minute of June 4, 1907. That being unquestionably true, the tender made of the second premium by the brother of the deceased on May 31, 1907, while the policy was still in full force and effect, was clearly made within the time agreed to by the parties, if the entire contract is to be considered as a whole.

“If this is not true, then, by parity of reasoning advanced by counsel for appellant, the policy was never in force, for the simple reason that the first premium was not paid on May 24, 1906, but was paid on the 5th of June, 1906, the date the policy, by its terms, went into effect. This very act of the parties,

under the facts and circumstances in the case, puts a practical construction upon the contract made and entered into between them, namely: That each succeeding annual premium should be paid during the life of the policy, and thereby keep it in full force and effect for the period of time stated therein.

"If this is not the true meaning of the parties, then the appellant is driven to the conclusion that the deceased paid for a full year's insurance; but under the terms of the policy he was only entitled to about 11 1-2 months of insurance.

"This nor any other court should allow an insurance company to thus stultify itself after taking the premium for a full year, and then escape liability by interposing the technical question that by the application for the policy the insured agreed to pay the premium long before it was due.

"That contention of counsel for appellant is not in harmony with the rulings of the best considered cases disposed of by the courts of last resort in this country and in England.

"These views are so thoroughly in harmony with the rulings of the various courts of America it would be a useless waste of time and space to cite them, which, however, will be cited by the reporter in the publication of this opinion."

The case of *Cilek vs. New York Life Ins. Co.*, 149 N. W. 49, is a case more clearly in point than any of the foregoing mentioned, or any case that we have been able to find. The opinion does not give the provision of the policy in reference to the due-date of the premiums, but the application and policy provided, as in this case, that it should not take effect or be in force until the policy was delivered and the premium paid. The court held that the policy did take effect from that date and the insured must get a full year's insurance for a full year's premium. We quote from it as follows:

“The application which the assured signed June 13th contained a clause that the company would incur no liability under the application until it had been received and approved by the company at the home office and the premium had actually been paid to and accepted by the company or its authorized agent during the lifetime and good health of the applicant. The application was not received and approved by the company at its home office until June 23d, and, in the absence of proof as to when the premium was paid, we must assume that it was not paid until the policy was delivered, some days later. The contract of insurance was, therefore, never a contract binding upon both parties prior to, at the earliest, June 23d. The policy contains this stipulation on the part of the company:

“ ‘A grace of one month, during which the policy remains in full force, will be allowed in payment of all premiums except the first, subject to an interest charge at the rate of 5 per cent. per annum.’

“If the contract of insurance did not become binding until June 23d, the death of the assured on July 23d was within the month of grace allowed, and the policy had not lapsed. This very question was before the Supreme Court of the United States in the case of McMaster against this same defendant, and the company was held liable by a united court, in a very clear opinion by Mr. Chief Justice Fuller, which is reported in *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.”

The court then reviews the McMaster and Stram-Back cases above cited, and concludes as follows:

“Little could be added to what has been said by these two eminent courts in their opinions above cited. Their reasoning meets our entire approval. We therefore hold that the contract of insurance in the case at bar did not go into effect until June 23, 1899; that the payment of premium for each succeeding year down to and including the payment in June, 1905, extended the life of the policy for an additional year from June 23d;

and that with the one month's grace added to June 23, 1906, the policy had not lapsed, but was in full force and effect at the time of Mr. Rye's death."

It is true that, in the Methvin case, the policy was delivered a few days after the policy was dated, which date cut short the actual time that the policy was carried for the first quarter, but there is nothing in the provisions of the application or policy that could change the clear language of the policy as to the due-dates of the premiums. The courts clearly constrain to hold that it could not vary the written terms of the contract. But, if the policy in that case, as in this, had provided that the first premium was to be paid on the delivery of the policy, and thereafter, quarter-annually, the court would doubtless have enforced the contract as it read.

THE CASES RELIED UPON BY PLAINTIFF IN ERROR HAVE NO BEARING UPON THE CASE AT BAR.

There is not a single case cited by counsel for plaintiff in error that has the slightest bearing on this case. We will put in parallel columns the provisions in reference to payment of premiums of a few of them, with that contained in the policy in this case, so that the court can see at a glance that they have no application whatsoever.

In *McConnell v. Ins. Co.*, 92 Fed. 769, the provision is:

The provision in the policy in the case at bar is:

“The annual premium on this policy may be paid by quarterly installments, as hereinafter stated, on or before the 27th day of April, July, October and January in each year.”

What possible aid an opinion, construing such a provision, can give this court in construing the provision in this case, is beyond us. It certainly has not the slightest application.

In *Methvin v. Ins. Co.*, 61 Pac. 1112, the provision is:

“That the said company, in consideration of the application and the payment of a premium of \$24.96 on or before the 30th day of July, October, January and April in each year, for the period of twenty years from the date hereof, does,” etc.

A blind man can see, without reading the opinion in the *Methvin* case, that it can have no possible bearing on this case.

“P R E M I U M —
Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company.”

The provision in the policy in the case at bar is:

“P R E M I U M —
Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company.”

In *Thomas v. Ins. Co.*, 75 Pac. 665, the policy provided:

"The premium thereon was \$90.90, payable semi-annually, on the 25th day of January and July each year."

A reading of the two quotations above is all that is necessary. The *Thomas* case is clearly without point in reference to this case.

In *Tibbetts v. Ins. Co.*, 65 N. E. 1033, the provision of the policy was:

"In consideration of the sum of \$22.52 to it in hand paid by John C. Tibbetts, and of the quarter-annual premium of \$22.52 to be paid at or before twelve o'clock M., on the 25th day of April, July, October and January in each year during the continuance of this policy, does insure," etc.

"P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company."

The provision in the policy in the case at bar is:

"P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the Company."

What possible reliance plaintiff in error can place on the *Tibbetts* case cannot be found in its dis-

cussion of it, nor in the similarity of the provisions contained in the policy.

In *Jewitt v. Ins. Co.*, 112 N. W 734, the provision was:

“On or before the 11th day of August, November, February and May in each year, until ten full annual payments have been paid, or until the prior death of the insured.”

A glance at the two provisions is all that is necessary to show that there is no parallel in the two cases.

In *Tigg vs. Ins. Co.*, 133 N. W. 322, the policy provided:

“In consideration of the application——, and of the sum of \$38.98, to it in hand paid, and of the annual premium of \$38.98 to be paid at the office of the company in the City of Davenport, Iowa, at or before twelve o'clock

The provision in the policy in the case at bar is:

“P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the Company.”

The provision in the policy in the case at bar is:

“P R E M I U M — Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the Company.”

M., on the 7th day of August in each year, during the life of the insured," etc.

Is there any analogy between the provisions in the two cases?

We will not burden the court by quoting the provisions in other cases cited. All the other cases are less in point, if possible, than the foregoing ones.

In each of the foregoing cases the company did succeed in beating the insured out of a few days of insurance actually paid for, because the delivery of the policy was a few days subsequent to the due-dates of the premiums, as strictly provided by the policy. The courts felt compelled to do this because of the clear, unequivocal wording of the contract. But in this case the matter is reversed. This court, *in order to deprive* the defendant in error of a single day of insurance actually paid for, would be compelled to violate the clear meaning of the language of the contract. In those cases cited by plaintiff in error, the applications did not provide, as in this, that "said policy shall not go into effect until the same shall be issued and delivered by the said company and the first premium thereon paid in full," etc., followed by a provision in the policy, "Premium—Twelve and 70-100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home office of the company."

THE ALTERNATIVE PROVISIONS IN

MAKING THE PAYMENT OF PREMIUMS, DOES NOT MILITATE AGAINST THE VIEW WE HAVE HERETOFORE MAINTAINED.

We have discussed the case on the theory, that the controlling provision of the policy in reference to the due dates of the second and other quarterly premiums, is dominated and clearly controlled by the provision of the policy, so frequently heretofore quoted.

Defendant in error insists that the alternative provision dominates. This is the whole paragraph:

PREMIUMS—"Twelve and 70/100 Dollars, payable on the delivery of this policy and thereafter quarter-annually at the Home Office of the Company, *or* as provided under the heading 'Provisions' on the second page hereof, in exchange for the Company's receipt on or before the nineteenth day of February, May, August and November in every year during the continuance of this Policy, until ten full years' premiums shall have been paid, or until the prior death of the insured."

That part of the "Provisions on the second page" referred to in the foregoing paragraph, that relates to the due date of the premiums, is as follows:

"Premiums are payable at the Home office of the Company, but may be paid to an agent of the Company on or before the dates

when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company.”

The first clause provides that “first premium of \$12.70 must be paid on the delivery of the policy and thereafter, quarter-annually, at the Home Office of the Company, or (alternatively) they might be paid on the dates specified under the provisions of page 2. Now, this clause reiterates that all premiums are payable at the home office of the company, but further provides that they may be paid on or before the dates mentioned, to an agent of the company, having the specified official receipt, and the negative of the proposition follows that he could not pay to the agent unless he had the official receipt. In other words, giving full meaning to all the words of the different provisions, they simply provide that the second quarterly premium was to be paid one-quarter of a year after the delivery of the policy at the home office of the company, but might be paid if the insured desired to an agent, having the official receipt, on or before the dates specified.

The most that could possibly be claimed by the plaintiff in error is, that under the provision, the second quarterly premium must be paid one-quarter of a year after the delivery of the policy—or (an option) on the 19th day of May, August, November and February. But, this would not help plaintiff in error.

The utmost claim that plaintiff in error could make is, that the clauses make it ambiguous as to the due dates of the premiums. But, this would be of no avail to the company. All the rules of the construction of a policy of insurance, where the insurance company is trying to maintain a forfeiture, are against it.

In the case of *McMaster vs. Ins. Co.* 44 Law Ed. 73, the court says:

“We are dealing purely with the question of forfeiture, and the rule is, that if policies of insurance contain inconsistent provisions, or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract.

Thompson vs. Phenix Ins. Co., 136 U. S. 287, 34 L. Ed. 308, 10 Sup. Ct. Rep. 1019; *First Natl. Bank vs. Hartford F. Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563.”

In the case of *Royal Ins. Co. vs. Martin*, 48 L. Ed. 389, the court uses this language:

“As the words of the policy are those of the company, they should be taken most strongly against it, and the interpretation should be adopted which is most favorable to the insured, if such interpretation be not inconsistent with the words used.”

To the same effect is *Liverpool Ins. Co. vs. Car-*

ney, 45 L. Ed. 462, where the court uses the following language:

“To the general rule there is an apparent exception in the case of contracts of insurance; namely, that where a policy of insurance is so framed as to leave room for two constructions the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company’s attorneys, officers, or agents prepared the policy, and it is its language that must be interpreted.”

Cooley, in *Briefs on Insurance*, Volume 1, page 632, clearly states the rule in this language:

“It is now the well-settled rule that contracts of insurance will not be subjected to any critical or technical interpretation, but will be liberally construed in favor of the insured, whenever there is an ambiguity in the language used.”

Again on page 633 of the same volume, the same author, citing authorities, uses this language:

“In view of the rule that the policy should be liberally construed in favor of the insured, it follows that provisions of the contract limiting or avoiding liability will be construed strictly against the insurer.”

Again, on page 636, he uses this language:

“Contracts of insurance, whether of life or fire insurance, will, therefore, be construed so as to avoid a forfeiture, if possible.

In accord with these principles, it is recognized as the settled doctrine that a policy of insurance must be liberally construed in favor of the insured, so as not to defeat without necessity, his claim to the indemnity, which, in making the insurance, it was his object to secure; and, when the words are without evidence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted.”

THE ATTEMPT OF THE INSURANCE COMPANY TO SHOW THAT ITS AGENT ATTEMPTED TO OR COULD CHANGE THE TERMS OF THE POLICY, IS UNAVAILABLE.

The plaintiff in error introduced evidence, over the objection of the defendant in error, to the effect that the agent of the company, when the policy was delivered, undertook to and did convince the insured that the premiums were payable on the 19th day of February, May, August and November. In other words, the agent claimed that he misrepresented to the insured the clear meaning of the contract. The defendant in error then offered in evidence in rebuttal, statements made by the insured, subsequent to the delivery of the policy to his wife, that his premium would be payable on the 15th day of July, and that he had a month's grace thereafter, in which

to pay; that in fact, on the morning of the day he was drowned, while writing some letters, he told his wife that his premium was due, and that he ought to send a check, but that he had until the 15th day of August in which to do it, and that he would do it that day or shortly after. The testimony of the agent of the company was clearly inadmissible, but if it was admitted, we think, the court erred in not admitting the testimony we offered. But, that such testimony is of no avail to the insurance company, we think, is settled by an overwhelming weight of authorities.

In the first place, the policy specifically provides, "that no condition or provision of this policy can be waived or modified in any case, except by an endorsement signed by the president, one of the vice-presidents, secretary or assistant secretary, etc.; that no agent has power, in behalf of the company, to make or modify this or any other contract of insurance." In fact, the agent did not claim to have any such power. So, the evidence was clearly inadmissible. In fact, we think a court would be very loathe, even though the agent had the power, to consider such testimony favorably. Two parties were present in the room, the insured, who is dead, and the agent of the company who is testifying on its behalf. Such a rule would permit the grossest of fraud in favor of the company.

In fact, we do not think it would be competent for the company itself to show that a contract which had been prepared by its own officers or by itself,

could be changed or modified by testimony, statements made, etc., at the time of the delivery of the contract and contemporaneously with it.

We do not think it necessary to cite any authorities to support our contention, that this testimony was entirely inadmissible. It should be rejected, as the court below rejected when it granted our motion for a directed verdict.

We will cite but one authority, and it is the case of the *Northern Insurance Co. vs. Grand View Building Association*, 46 Law Ed. 213. This case reviews at great length this question. We quote only a portion thereof on pages 234 and 235 as follows:

“What, then, are the principles sustained by the authorities, and applicable to the case in hand? They may be briefly stated thus: That contracts in writing, if in ambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the company, are usual and reasonable; that it

is reasonable and competent for the parties to agree that such knowledge and consent shall be manifest in writing, either by endorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing endorsed upon the policy or by writing attached thereto, express the company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as matter of law, to be aware of such limitation."

We believe that no error was committed by the lower court, and that the judgment should be affirmed.

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